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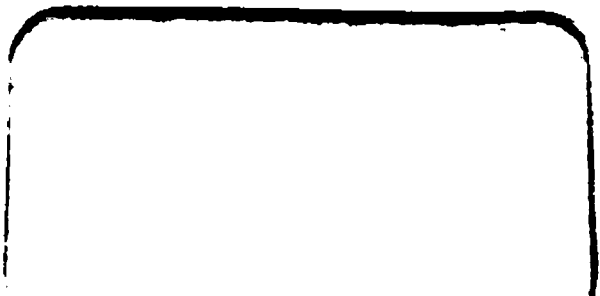
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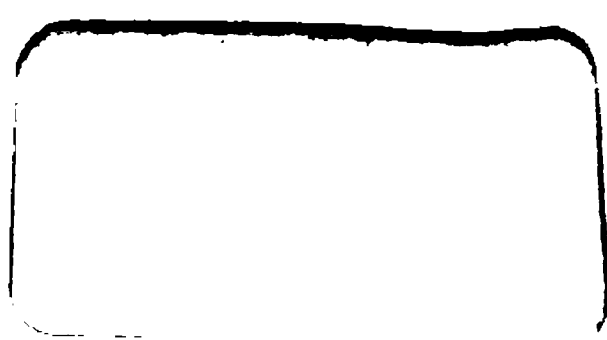
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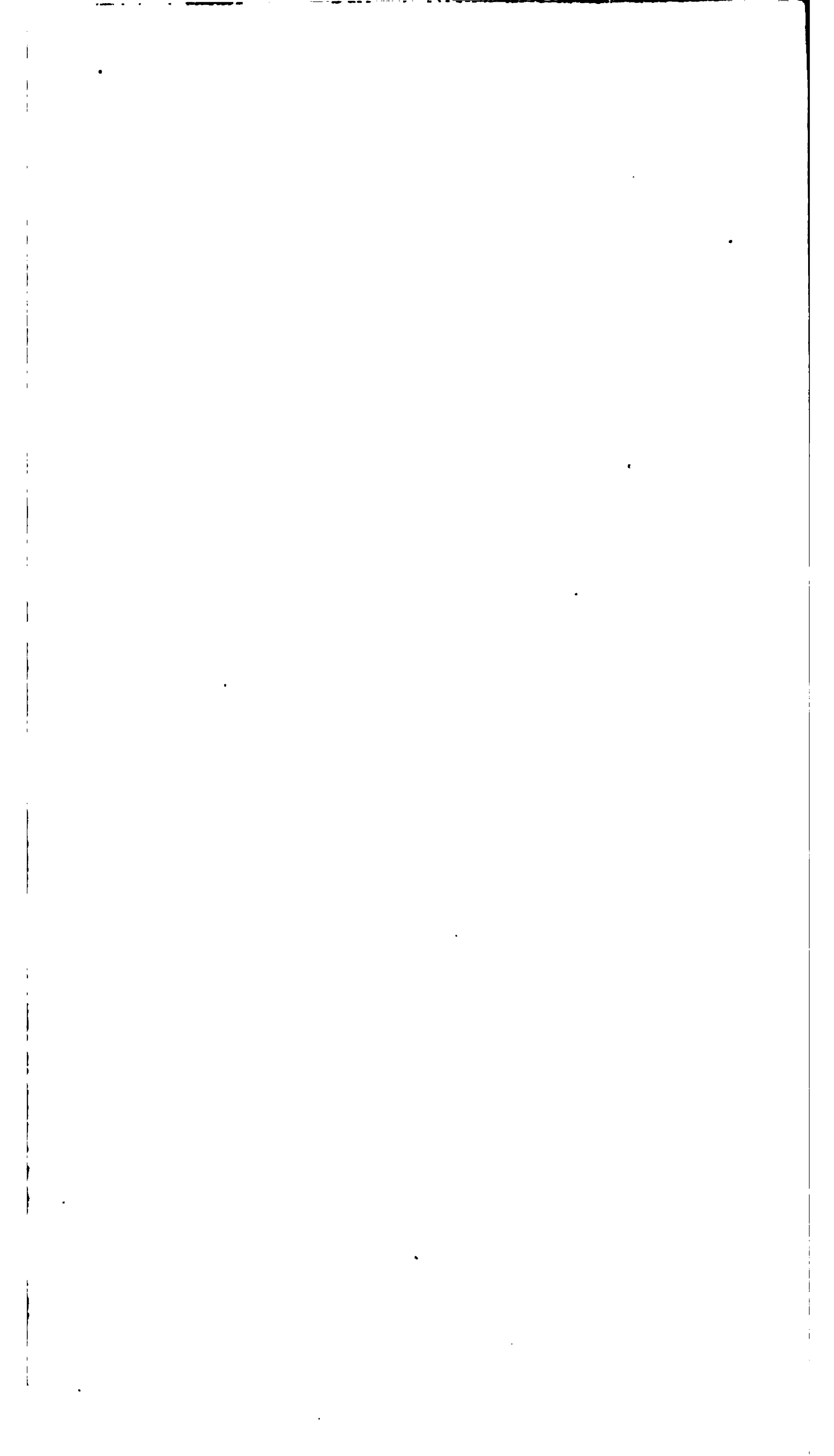
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXVI.

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AMERICAN STATE REPORTS.

VOL. LXVI.

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AMERICAN STATE REPORTS.
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CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

WILSON v. DONALDSON.

[121 CALIFORNIA, 8.]

CHATTEL MORTGAGE—CONFLICT BETWEEN AND A LABORERS' LIEN.—A statutory laborers' lien for services performed upon a growing crop is subordinate to the lien of a pre-existing chattel mortgage.

A. E. Miller and W. A. Gett, Jr., for the appellant.

Albert M. Johnson, for the respondent.

GAROUTTE, J. Respondent, owning a certain tract of land, leased it to defendant William Donaldson for a share of the " crop as rent, to be delivered in the sack to her. He also gave her a chattel mortgage upon all his interest in the growing crop to secure a then existing indebtedness. William Donaldson hired appellant C. L. Donaldson to harvest the crop at an agreed price of one dollar per acre. The grain was harvested under this contract, and upon the completion of the work this appellant took possession of two hundred and fifty sacks of the grain, claiming a lien thereon to the extent of his contract price for the labor performed. Respondent claims the property under her chattel mortgage, executed and recorded before the grain was ready for the harvesting.

Appellant contends that he is entitled to a lien upon the grain by virtue of sections 3051 and 3052 of the Civil Code, which relate to statutory liens created when labor is performed upon personal property under the various circumstances there enumerated. Upon principle, *Douglas v. McFarland*, 92 Cal. 656,

to some extent at least, supports the right of appellant Donaldson to claim a lien upon the grain for his labor under the circumstances we have detailed. For the purposes of the case alone it may be conceded that he is entitled to a lien. Such concession being made, the important question at once presents itself, Does this statutory laborer's lien of Donaldson take priority over the lien created by the chattel mortgage? An examination of the authorities upon the question from the various states of the Union discloses a conflict of judicial opinion. A well-considered case upholding the priority of the statutory or laborer's lien may be found in *Case v. Allen*, 21 Kan. 217; 30 Am. Rep. 425. But the great weight of authority is the other way: *Pingrey on Chattel Mortgages*, sec. 730, 731; *Jones on Liens*, sec. 691; *Jones on Chattel Mortgages*, sec. 472; *Storms v. Smith*, 137 Mass. 201; *Ingalls v. Vance*, 61 Vt. 582; *Hanch v. Ripley*, 127 Ind. 151. It is well said in the case last cited: "As the agister's lien depends alone upon the statute, it can have no greater force than the statute gives, and the legislature has, as we have said, manifested no intention of giving to it superiority over other liens, it can have none." In the absence of the statute, the appellant would have no lien whatever. All his rights come from the statute, and therefore must be weighed and limited by the statute. If the legislature had desired to give such lien claimants a priority over ¹⁰ contract liens, it was an easy thing to have said so. And a declaration to that effect not violative of constitutional rights might be in line with a sound public policy. But here there is no such declaration, and it is not for the courts to ingraft such an amendment upon the law.

We have in this state a legislative declaration as to priority of liens in general, which reads as follows: "Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia." It may well be said that "other things" are equal in this case. If not equal, then they preponderate largely in favor of the chattel mortgage. This is no question of balancing existing equities between the chattel mortgagor and the chattel mortgagee, but a question of equities between the chattel mortgagee and a third party—a stranger, and such equities are all in favor of the chattel mortgagee. We find none in favor of the third party, the statutory lien claimant. The chattel mortgagee gave full value for her right of lien, and was first in

point of time. She notified all the world of her rights, and warned the world to deal with the property at their peril. She made a contract expressly authorized by the law, and did all that the law demanded of her in order to preserve the fruits of her contract. No court of equity can suggest a single defect in her conduct. Upon the other hand, this appellant, with full knowledge of the existence of the chattel mortgage, contracted to harvest the crop. He did this voluntarily, and if he suffers loss by such conduct it is his own fault. It was a matter of choice upon his part to do the work, and he assumed the risk of losing his hire when he entered into the contract. To be sure, his labor may have been necessary for the preservation of the crop. At the same time it may be said that the chattel mortgage lien was occasioned by the advance of money to furnish the seed and plow the ground. If the words "other things" found in the statute quoted refer to equities (which we do not decide), then it may readily be seen that those words furnish no comfort to appellant.

It would seem that a great number of the cases cited from other states, tending to support appellant's contention as to the priority of a statutory lien over a contract lien, may be distinguished from the principle we deem controlling in this state. In many jurisdictions ¹¹ where these decisions are found, a chattel mortgage carries with it title to the property and the immediate right of possession. In this state there is no such law, either as to the title or the right of possession. As the law stands in those states, the mortgagor by consent retaining possession of the property, the courts seem to hold that repairs necessary for its preservation, when ordered by the mortgagor in possession, being made upon the mortgagee's property, are deemed in equity to be made at his request. It may be said that in such cases the question is hardly one of priority of liens.

The remaining contention relied upon by appellant has no substantial merit.

For the foregoing reasons the judgment and order are affirmed.

Van Fleet, J., and Harrison, J., concurred.

Hearing in Bank denied.

CHATTEL MORTGAGE AND STATUTORY LIENS—PRIORITY.—A mechanics' lien for the repair of a chattel is subordinate to a prior duly recorded mortgage thereon for purchase money; *Denison v. Shuler*, 47 Mich. 598; 41 Am. Rep. 734, and note; *Sow-*

den v. Craig, 26 Iowa, 156; 96 Am. Dec. 125. See monographic note to Loonie v. Hogan, 61 Am. Dec. 690, 691. But if a mortgagor of machinery upon which, through use, repairs and alterations will become necessary, leaves it in the possession of the mortgagor to be used by him, it will be presumed that they contemplated that repairs thereon would become necessary, and that the mortgagor was authorized, if necessary, to intrust it to a mechanic for repairs; and, when it is so intrusted, the mechanic has a lien thereon paramount to the lien of the mortgage for materials and labor furnished in such repairs: Watts v. Sweeney, 127 Ind. 116; 22 Am. St. Rep. 615, and note.

WHEELER v. ELDBRED.

[121 CALIFORNIA, 28.]

EXECUTION—LEAVE TO ISSUE—DISCRETION OF COURT IN REFUSING.—Under a statute providing that in all cases a judgment may be enforced or carried into execution after the lapse of five years from the date of entry by leave of the court, it has a discretion to grant or refuse such leave, and its order refusing leave will not be interfered with by the appellate court, unless abuse of its discretion is shown.

Application made in January, 1896, for leave to issue execution upon a judgment entered April 23, 1890, foreclosing a mortgage. The affidavit filed on behalf of the plaintiff stated that on May 7, 1891, an action was commenced to vacate the judgment, and an injunction was therein issued restraining the sale of the property; that this suit resulted in a judgment in favor of the plaintiff herein, and an appeal was taken, and the judgment was not affirmed until June 2, 1894; that in March, 1892, the wife of the defendant also commenced a suit to enjoin the enforcement of the judgment, in which a preliminary injunction was issued, and that the suit remained pending until May 14, 1895, when it was decided in favor of the plaintiff herein. The wife of the defendant and also certain mortgagees appeared in opposition to the motion, and by their affidavits denied that an injunction ever issued in the action commenced on May 7, 1891, and averred that on the day of entry of the judgment, to wit, April 23, 1890, execution issued thereon, under which the property described therein was advertised by the sheriff to be sold on May 17, 1890, and such sale was postponed one week, at the end of which time execution was returned by the sheriff, at the direction of the plaintiff, wholly unsatisfied; that in August, 1891, and at other subsequent dates, certain mortgages were executed by the defendant and his wife in favor of the mortgagees who appeared in resistance of the motion for

execution, and that the defendant and his wife also filed a homestead on the property on January 27, 1893. The motion was denied by the trial court on the ground that the amendment of the Civil Code relied upon by the plaintiff had not been adopted until March, 1895, and did not act retroactively, so as to be applicable to the judgment here in question. The plaintiff appealed.

Henley & Costello, for the appellant.

J. A. Cooper and J. H. Seawell, for the respondent.

BRITT, C. In this action a judgment of foreclosure, directing the sale of certain mortgaged lands, was entered in favor of the plaintiff on April 23, 1890. The period of five years allowed by statute for issuing process as of course on the judgment having expired, and no sale having been made, the plaintiff noticed a motion in January, 1896, for leave to carry the judgment into execution pursuant to section 685 of the Code of Civil Procedure. It is provided in said section, as amended in the year 1895, that: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings," et cetera. The court denied the motion.

Several interesting questions are raised in argument touching the effect, and even the validity of said amended section of the code; only one of them need be now examined. Plaintiff does not contend that the denial of his motion was, in view of the evidence before the court at the hearing, an abuse of power, if the court can exercise discretion in such cases; but he claims that under the statute the court had no discretion to refuse his application. This position cannot be maintained. By statute in New York, "After the lapse of five years from the entry of a final judgment, execution can be issued thereupon, 2. Where an order is made by the court granting leave to issue the execution" (N. Y. Code Civ. Proc., sec. 1377); and it is there held by the court of appeals that the effect of this provision, in a case within its terms, is to render the allowance of a writ of possession on a judgment for the recovery of lands a matter "resting wholly in the discretion of the court": *Van Renssalaer v. Wright*, 121 N. Y. 626. See *Bank of New York v. Eden*, 17 Johns. 105, which asserts discretion in the court whether it would allow a scire facias on a judgment of more than

lowed to intervene in the cause. The San Diego Water Company had instituted a similar suit against these defendants, and the actions were consolidated.

Before the trial there was presented a motion for a change of venue, upon the ground of the disqualification of Judge Torrance, in whose department the action was pending. Grounds identical with those urged as disqualifying Judge Torrance were asserted to exist in the case of the other judges of the superior court of the county.

The affidavits used at the hearing show that the judge was the owner of real property situated and taxed in the city of San Diego for municipal purposes, and taxable for the payment of a ¹⁰⁴ bonded indebtedness such as that the validity of which is a question in the case. It also was made to appear that the issuance of the bonds in controversy and the carrying out of the contract between the city and the defendant water company would necessitate a special tax for forty years and directly affect the value of all real property subject to it. Upon the other hand, a determination that the contract and proceedings were illegal would result in a decree enjoining the issuance of the bonds, and relieve all property within the municipality from the burden of the bond redemption tax.

The trial judge concluded that he was not disqualified, refused to grant the motion, and retained the action.

From this ruling and order the San Diego Water Company and certain intervenors prosecute their appeals.

By section 170 of the Code of Civil Procedure it is provided that no justice, judge, or justice of the peace shall sit or act in any action or proceeding to which he is a party, or in which he is interested. This is but an expression of the ancient maxim that no man ought to be a judge in his own cause, a maxim which appeals with such force to one's sense of justice that it is said by Lord Coke to be a natural right so inflexible that an act of parliament seeking to subvert it would be declared void: Coke on Littleton, sec. 212. It is a principle which finds expression in the constitutions of many of our states which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy. For it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it to be free from the charge of interest or the taint

of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired.

But what is the interest which will disqualify? For it is manifest that just bounds must be set to the meaning of the word, since, if a judge be not disqualified, it is as much his duty to retain the action as it is to remove it when the recusation is well founded: *Heinlen v. Heilbron*, 97 Cal. 101.

In the oft-quoted case of *Hesketh v. Braddock*, 3 Burr. 1856, the interest imputed to the jurors, and to the officer who returned them, rested upon the fact that they were members of ¹⁰⁵ the municipal corporation which was seeking to recover a penalty due. The whole penalty was but five pounds, yet the proceeding was quashed by the court of king's bench, Lord Mansfield saying: "The law has so watchful an eye to the pure and unbiased administration of justice that it will never trust the passions of mankind in the decisions of any matter of right. . . . There is no principle in the law more settled than this, that any degree, even the smallest degree, of interest in the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned. If, therefore, the sheriff, a juror, or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him. The minuteness of the interest wont relax the objection, for the degrees cannot be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever." But this, it should be noted, is rather a declaration of the principle than a definition of the disqualifying interest, and while in terms this case does not include the judge as coming within the principle of disqualification, it is not to be doubted that it applies with equal strength, and with more reason, to such an officer: *Dimes v. Grand Junction Canal Co.*, 16 Eng. L. & Eq. 63. The disability of a witness to testify because of interest induced great hardship and led to many absurdities. Thus, one was not debarred from being a witness if it was determined that his interest was equally balanced, nor was the heir apparent to an estate incompetent to testify in support of the claim of his ancestor, though his expectation of inheriting might be immediate and well nigh certain. Again, the interest of a parent in a child, or of the child in the parent, was not a disqualifying interest, but only such as to affect the credibility of the witness. The injustice and hardship of the rules as to witnesses soon became so appar-

ent that by statute it was entirely abrogated, and now no interest disqualifies a witness, its sole effect being to impair his credit.

In the case of jurors, however, who are judges of the fact, and of the magistrates, judges, and justices who are judges of the law, and frequently both of the law and facts, there has been far less relaxation of the principle, and this, if for no other reason, because the courts themselves, in their desire to preserve the ¹⁶⁶ administration of justice free from the taint of unfairness, have inclined to a strict enforcement of the principle, and also because there are well-defined limits to the power of the legislature, should it ever seek to overthrow so salutary a rule.

Thus, in *North Bloomfield etc. Co. v. Keyser*, 58 Cal. 315, this court, citing section 170 of the Code of Civil Procedure, declares that the provision should not receive a technical or strict construction, but rather one that is broad and liberal, and quotes with approval the language of the supreme court of Michigan in *Stockwell v. Township Board*, 22 Mich. 350, to the following effect: "The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim, when the principle embodied bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." And in *Heilbron v. Campbell* (Cal., Dec. 28, 1889), 23 Pac. Rep. 122, it is said again by this court: "It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality, and to this end he should decline to sit . . . in any case in which his interest in the subject matter of the action is such as would naturally influence him either one way or the other.

Upon the latter proposition, that of the power of the legislature to modify or abrogate the rule, statutes have been passed and upheld by the courts which remove the disqualification of jurors and of judges who are merely corporators of a municipal corporation and taxpayers therein, which corporation is a party interested. These statutes have been countenanced by the courts upon the ground that the interest of the juror or judge is so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of the individual. It is to be remembered, however, that they are in derogation of the common-law rule, and it will always be a judicial question, as to any par-

ticular statute, whether or not by its terms or in its effect it violates this fundamental principle of judicial decision. Thus Judge Cooley: "But, except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish ¹⁰⁷ a maxim which is among the fundamentals of judicial authority. The people of the state, when framing their constitution, may possibly establish so great an anomaly, if they see fit; but, if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized in the execution of this trust to do that which has never been recognized as being within the province of the judicial authority": Cooley's Constitutional Limitations, 6th ed., 508. The only other exception to the operation of the maxim is that which arises in the nature of the government of the state, and has its existence in absolute necessity. Thus, to illustrate, where the legality of a bonded indebtedness of the state comes before its tribunals, they must act, or the right remain forever without the possibility of its enforcement. In such cases, however, the judges are as fair and impartial as the lot of humanity doth permit, and trial before such is all that the constitution, or Lord Coke's *jus naturae*, can preserve to any man.

It has been pointed out that in most of the states the common-law rule disqualifying a juror for interest by reason of the fact that he is a corporator of the city or town which is a party to the suit has been changed by statute, and that these statutes have been upheld by the courts upon the ground of the remoteness and contingency of the interest. In our own state, section 602 of the Code of Civil Procedure declares the grounds upon which challenges for cause may be taken, and subdivision 5 provides as a ground of challenge "interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation." Nothing herein expressly removes the disqualification of the judge, which alike with that of the juror existed at common law. But, if the interest of a juror so situated is too remote to disqualify him as a trier of fact, equally, it may be argued, would a like interest be insufficient to disqualify a judge, and thus without express statutory enactment upon the question, the conduct of judges in trying actions where the sole ground of their disqualification is the fact that they are corporators and taxpayers of the municipal corporation which is a party thereto, has always been

countenanced and upheld. Yet here it may be remarked that the state is not without some statutory ¹⁰⁸ enactments upon the question. Many may be found conferring upon municipal courts and the judges therein jurisdiction of petty offenses for the violation of ordinances and for the collection of revenues under such ordinances. It has never been, and at this day may not be, seriously questioned that a judge of such municipal court is not disqualified by reason of interest merely because of the fact that he is a member and taxpayer of the municipal corporation, either in civil cases where its ordinances are under consideration, or in criminal cases where the penalties, fines, and forfeitures for the violation of such ordinances accrue to the municipal treasury.

In a very great number of the cases which have come under review in the consideration of this question nearly all have to do with the interest of the judge or juror as a member of such public corporation, and in these, where the ancient rule has not been modified by statute, that rule is for the most part observed in all its strictness. Of these cases there may be cited as instructive upon the question: *State v. Stuart*, 23 Me. 111; *State v. Woodward*, 34 Me. 293; *Commonwealth v. Ryan*, 5 Mass. 90; *Pearce v. Atwood*, 13 Mass. 324; *Trustees v. Bailey*, 10 Fla. 238; *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114; *Northampton v. Smith*, 11 Met. 390; *Foreman v. Marianna*, 43 Ark. 324; *Peck v. Essex*, 21 N. J. L. 656; *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190; *Commonwealth v. Reed*, 1 Gray, 472; *Ellis v. Smith*, 42 Ala. 349; *Fine v. St. Louis Public Schools*, 30 Mo. 166; *Stockwell v. Township Board*, 22 Mich. 350; *Fiske v. Paine*, 18 R. I. 632; *Dimes v. Grand Junction Canal Co.*, 18 Eng. L. & Eq. 63; *Oakley v. Aspinwall*, 3 N. Y. 547.

In *Northampton v. Smith*, 11 Met. 390, Chief Justice Shaw, with his usual clearness, has defined this disqualifying interest. He says: "1. We think it is not to be a mere possible, contingent interest, not an interest in the question or general subject to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof. . . . It must, therefore, depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. 2. It must be a pecuniary or proprietary interest, a relation by which as debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling or sympathy or bias which ¹⁰⁹ would disqualify a juror." (It may be here re-

marked to prevent misunderstanding, that by an amendment to section 170 of the Code of Civil Procedure bias or prejudice upon the part of the judge is now made a ground of disqualification, and a reason for the motion of a cause.) "3. It must be certain, and not merely possible or contingent. It must be direct and personal, though such a personal interest may result from a relation which the judge holds, as the member of a town, parish, or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings."

Thus the interest which one has in a public question merely because he is a member of the civic body to be affected by the question is not the interest which the law has in mind. In the case from which we have just quoted, the judge in probate was not held to be disqualified because in a will before him there was a bequest of money to trustees to be devoted to the use and benefit of indigent persons in certain towns, of one of which the judge was an inhabitant. So in *Foreman v. Marianna*, 43 Ark. 324, the judge, who was an inhabitant of the town, was not for that reason held to be disqualified to sit in and determine upon proceedings for the annexation of territory to the town, although an election had been called to pass upon the question of annexation and the judge had voted thereat. And so in *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190, the fact that the circuit judge, with other registered voters of the county, had signed a petition addressed to the county commissioners, asking for a change of the county site, did not qualify him for interest from sitting in a mandamus proceeding to compel the commissioners to call an election upon the question. In these and like cases the so-called interest of the judge is found to be remote, doubtful, and speculative, and in no way certain in fact, nor susceptible of precise measurement.

But, upon the other hand, where in any litigation there is any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered, in every such case without exception, so far as an exhaustive examination of the authorities goes, the disqualification of the judge is held to exist. Has the judge any pecuniary or personal right or privilege directly affected by or immediately ¹¹⁰ dependent upon the result of the case? As that question is answered, so is answered the question of his disqualification for the interest which we have been considering. In *Heilbron v. Campbell*, 23 Pac. Rep. 122, the action

was between divers claimants to a tract of land to which the judge himself asserted title. The judge was not a party to the suit, nor would the judgment rendered be binding between him and the other litigants. Yet this court in *Bank* held the interest to be disqualifying; and properly so, for though, generally speaking, an interest in the legal question, as distinguished from a pecuniary interest in the result of the case, is no valid ground of disqualification, there is to this the well-settled exception that where the judge has a lawsuit pending or impending with another person, which rests upon a like state of facts, or upon the same point of law as that pending before him, this is a valid ground of recusation: *Davis v. Allen*, 11 Pick. 466; 22 Am. Dec. 386; *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114.

In *North Bloomfield etc. Co. v. Keyser*, 58 Cal. 315, the action was by the city of Marysville to restrain the mining company from prosecuting its hydraulic work because the effect of its mining operations was to injure the lands of the corporation. The judge owned land, not within the municipality, but similarly situated and equally affected by the mining operations complained of. In an action for an injunction by the city against the mining company, it was held that the judge had such a direct and immediate interest in the result of the action as to disqualify him.

Even more immediate and direct is the interest of the judge in the case at bar than that which appeared in the *North Bloomfield* case. The disqualification does not spring from the fact that the judge is a citizen, inhabitant, and taxpayer of the city of San Diego, nor yet from the fact that the municipality is a party litigant in the action. It arises from the circumstance that he owns property within the city which may or may not be liable for the burden of a special tax for the period of forty years, as he shall decide. The validity of this tax is directly called in question. The judge himself, under the circumstances shown, could have instituted as plaintiff this identical action. "The rule is well settled that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of ¹¹¹ the others": *Story's Equity Pleadings*, secs. 97, 98; 1 *Freeman on Judgments*, sec. 178; *Brown v. Trousdale*, 138 U. S. 389; *Gamble v. San Diego*, 79 Fed. Rep. 487. He would have been entitled to intervene as well as those who in fact have intervened. The judgment which he renders in the case will be

binding upon his rights and his property. His interest is in the outcome of the litigation, and it is a direct, measurable, pecuniary interest.

The distinction between this case and that of *Oakland v. Oakland Water Front Co.*, 118 Cal. 249, is readily to be observed. Here, as has been said and shown, the judge is to decide directly whether or not property which he owns shall be made subject to the burden of a special tax. In the *Oakland waterfront* case the city sought to recover lands which had been granted to it by the state under certain trusts. Even if the city succeeded, it was at least doubtful whether the control of these lands would result in profit or loss to its finances. It was still more doubtful whether their management would affect the tax rate of the city in the slightest degree. The judge had no other interest in the litigation than that which he possessed in common with other citizens, and which arose from the fact that he was an inhabitant and taxpayer of the city. It was not a direct, measurable, or pecuniary interest in the litigation or its outcome. The interest was remote, contingent, and speculative. It might thus be fairly stated: If the city recovered the property, and if it successfully managed or sold it, the result might be to lessen the rate of taxation, and thus under all these contingencies to reduce in some slight indeterminate and undeterminable extent the tax rate upon the judge's property. Clearly, such a remote and contingent interest is readily to be distinguished from that in the case at bar, where the judge in a cause directly involving the legality of a tax imposed and to be imposed upon his land does by his ipse dixit declare whether the burden shall remain or be removed.

In *Austin v. Nalle*, 85 Tex. 520, the question of the interest of the judge under circumstances identical with those of the case at bar was presented, and the court reached the conclusion here declared. The same principle was invoked and the same ruling made in *Wetzel v. State*, 5 Tex. Civ. App. 27, and again in ¹¹² *State v. Cisco* (Tex. Civ. App., Nov. 30, 1895), 33 S. W. Rep. 244.

It is urged that the case of *Wade v. Travis County*, 72 Fed. Rep. 985, is authority against this position. This is in a measure true. It was an action in the circuit court of the western division of Texas, and the question of the disqualification of a federal judge by reason of his pecuniary interest under facts similar to those here presented was considered by the court. Its decision upon the proposition is in the following language:

"Authorities examined by the court leave the question in some doubt, and, for the purpose of having it definitely determined by an appellate tribunal, we have concluded to hold that that disqualification on the part of the district judge does not exist, and we suggest to counsel the propriety of preserving proper exceptions in order that the point may be conclusively settled by the court of appeals." It may be conceded that so far as it goes this case is against the conclusion which we have reached; but it should be said in this connection that it is the only case of its kind, and, as appears from the language of the learned judge, he decided as he did only in order that the question might be definitively laid at rest by the appellate tribunal.

As it is uncontradicted in this record that the same disqualification which existed in the case of Judge Torrance existed as to the other judges of the superior court of the county, it follows from what has been said that the motion for change of venue should have been granted.

The order is therefore reversed.

Garoutte, J., Temple, J., and Beatty, C. J., concurred.

Harrison, J., dissented.

IN THE CASE of *Adams v. Minor*, 121 Cal. 372, the question was presented whether a judge who was a stockholder in a bank which held the bonds of an irrigation district was an interested party, and hence disqualified from sitting in an action in which the validity of such bonds was drawn in question, and when, after he had heard the evidence, but before the rendition of the judgment, he had disposed of his stock. The court held: 1. That he was a party in interest, and hence disqualified to sit in the cause irrespective of the smallness of his interest in the result of the litigation; and 2. That though the judge sat throughout the trial, with the consent of counsel, and subsequently, and before the decision, disposed of the stock, his disqualification was not thereby removed, the code having disqualified a judge, if interested, from sitting in the cause as such. "This does not mean that he may hear the evidence in a case in which he is interested and may decide it, after sitting and acting in it, provided he remove the cause of disqualification before he enters judgment. As we all know, the decision of questions arising during the course of the trial often determines the final judgment itself. The statute must be held to mean what it says, and it is that he shall not sit or act as judge in an action in which he is interested."

JUDGES—WHEN DISQUALIFIED—PECUNIARY INTEREST. —A judge is disqualified from acting judicially in a case in which he has any pecuniary interest; but he is not disqualified by reason of having an incidental interest not pecuniary: *Clyma v. Kennedy*, 64 Conn. 310; 42 Am. St. Rep. 194, and note. It must be a property interest as contradistinguished from an interest of feeling or sympathy such as would disqualify a juror: *Ex parte Harris*, 26 Fla. 77; 23 Am. St. Rep. 548, and note. So his interest as an inhabitant of a town in the penalties exacted for crimes and misdemeanors,

may disqualify him from trying such cases: See monographic note to *Moses v. Julian*, 84 Am. Dec. 127. Membership in a church vestry may disqualify a judge to try or determine an application for the probate of a will made by the rector, wardens, and vestry of the church: *State v. Young*, 31 Fla. 594; 84 Am. St. Rep. 41, and note; *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190.

WITTER v. MISSION SCHOOL DISTRICT.

[121 CALIFORNIA, 350.]

STATUTES—STATE—WHEN NOT SUBJECT TO.—The state is not bound by general words in a statute which would operate to trench on its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it.

ASSESSMENTS FOR STREET IMPROVEMENTS.—A LOT BELONGING TO A SCHOOL DISTRICT is not liable for an assessment for street improvements if used for school purposes. If it is used for private purposes, or held as an investment or for rentals, or if, from any cause, it is not subject to the general rule exempting school property from such assessment, the complaint should so state.

G. F. Witter, Jr., for the appellant.

W. H. Spencer, for the respondents.

³⁵⁰ **CHIPMAN, C.** Action to enforce payment of assessment for constructing a sidewalk in front of certain lots in the city of San ³⁵¹ Luis Obispo, of which defendant, Mission School District, is alleged to be the owner in fee. Judgment passed for defendants on demurrer to the sufficiency of facts alleged, from which this appeal is prosecuted.

The complaint does not show whether the lots in question were or were not used by the district for school purposes, nor that any provision was made by the district for the payment of the debt out of its funds raised during the year the debt was created.

The only question presented by appellant is, whether these lots were subject to assessments under the act of March 31, 1891: Stats. 1891, p. 343. The act makes no exception as to owners of lots. The distinction between the term "assessment" and the term "taxation" was clearly pointed out in *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189; and it was there shown that there might be exemption from "taxation" under the constitution and the provisions of the Political Code, section 3607, where there would not necessarily be exemption from "assessments" of lands. Appellant relies upon this distinction and

upon this case to support his claim. It was held in *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451, that the terms "any building" in the mechanics' lien law did not include a public schoolhouse. In *Whittaker v. County of Tuolumne*, 96 Cal. 100, it was held that the word "person" used in section 1050 of the Code of Civil Procedure, giving a right of action in a certain case, did not include a county or authorize it to be sued. In *Skelly v. School District*, 103 Cal. 652, it was held that while a school district may be a person within the meaning of subdivision 5, section 542, of the Code of Civil Procedure, it could not be garnished, "because laws made primarily to provide for individual rights will not be presumed to include the state when the effect might be to authorize a suit against the state or embarrass it in the discharge of its functions." The principle of construction was stated in *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451, to be "that the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it."

The proceeding here is to foreclose the lien of plaintiff on the ³⁵² property of a school district and in default of payment to sell the property. If this property is used for school purposes, the inevitable result would be to injuriously affect the capacity of the district to perform its functions, quite as effectually as by the foreclosure of a mechanic's lien as was attempted in *Mayrhofer v. Board of Education*, 89 Cal. 110; 23 Am. St. Rep. 451.

In the case of *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, the lands were alleged to be pueblo lands of the city of San Diego, and were "vacant, unoccupied, and uncultivated agricultural lands, susceptible to cultivation, and would be largely benefited by irrigation; that they could not and cannot be profitably cultivated without irrigation and are practically valueless for any other uses than agricultural and horticultural," and that they were held and devoted to the private uses of the city and were not incidental to the performance of any public or municipal function. A demurrer was sustained in the lower court, but the judgment was reversed on appeal. No such state of facts appears in the complaint here. So far as shown, the lots in question may have school buildings upon them and may be used and occupied exclusively for school purposes, in which case we do not think this action could be main-

tained. As a private owner, however, of land not used exclusively for school purposes, but held as an investment or from which to derive rentals, as property of an individual is held and owned, we see no reason why the lands of a school district should not be assessed for improvements the same as those of any other private owner. But we think, as land belonging to school districts is liable for such assessments only when it is not used for school purposes, the complaint should allege the facts necessary to bring the case within the exception.

This it failed to do, and as plaintiff did not ask leave to amend in the court below and does not suggest now that he can amend in the particular referred to, the judgment should be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Temple, J. Henshaw, J., McFarland, J.

STATES—WHEN NOT BOUND BY WORDS IN STATUTE.—The state is not bound by general words in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it: *Mayrhofer v. Board of Education*, 89 Cal. 110; 23 Am. St. Rep. 451, and note; extended note to *People v. Herkimer*, 15 Am. Dec. 380-383.

SCHOOLS—ASSESSMENTS FOR LOCAL IMPROVEMENTS.—An assessment of school property for local improvements is not authorized by a statute which in general terms requires the assessment to be upon all real property situate in the district: *Board of Improvements v. School District*, 56 Ark. 354; 85 Am. St. Rep. 108. See *Mayrhofer v. Board of Education*, 89 Cal. 110; 23 Am. St. Rep. 451, and note.

RUSSELL v. AGAR.

[121 CALIFORNIA, 896.]

SPECIFIC PERFORMANCE CANNOT BE DECREED OF ANY AGREEMENT THE TERMS OF WHICH ARE NOT SUFFICIENTLY CERTAIN to make the precise act which is to be done clearly ascertainable.

WILL—AGREEMENT TO MAKE—WHEN TOO INDEFINITE TO BE ENFORCED.—A promise to an employe that if he will remain with his employer, and not enter into a contemplated business partnership with others, the employer will bequeath to the employe such a sum of money as will make good any loss to be suffered by him by not entering into such copartnership, is too indefinite and uncertain to support an action against the executor of such employer for his failure to make a bequest in favor of the employe. There can be no means of determining what would have been the result of the partnership had it been formed.

E. L. Campbell and J. S. Spillman, for the appellant.

Freeman & Bates, for the respondent.

³⁹⁶ HENSHAW, J. Plaintiff brought his action against defendant Agar as executor of the estate of Joseph McDonough, deceased, and for cause of action averred the following facts: For several years prior to the fourteenth day of September, 1894, he had been in the employ of Joseph McDonough in the capacity of salesman and collector. McDonough's business was that of a wholesale and retail dealer in coal in the city and county of San Francisco. By reason of his experience, extended acquaintance, and personal influence, plaintiff had created and controlled a large amount of McDonough's business. A short time prior to the fourteenth day of September, 1894, plaintiff was offered a fifth interest as partner in the business, goodwill, property, and profits to accrue in a firm engaged in the business of dealing in coal in said city and county. Plaintiff was not required ³⁹⁷ by the firm to contribute any money or other property to the partnership, but was offered the one-fifth partnership interest in consideration of his devoting his time and attention to the business, and of giving to the firm the advantage of his experience, extended acquaintance, and control over a large amount of coal trade in the city. Plaintiff believed that it would be to his interest to accept the offer, and explained it and its circumstances to his employer. McDonough, to prevent plaintiff's acceptance of the proposition, on the fourteenth day of September, 1894, entered into a contract with him as follows: "Plaintiff promised and agreed to and with said Joseph McDonough that he, said plaintiff, would reject the offer of the aforesaid firm, and would remain with and well and truly and faithfully serve the said Joseph McDonough in his said business as wholesale and retail dealer in coal, for such length of time as he, said Joseph McDonough, should continue to carry on said business, in consideration whereof the said Joseph McDonough promised and agreed to and with plaintiff that he, the said Joseph McDonough, would by his last will and testament leave and bequeath unto plaintiff such a sum of money as would make good to plaintiff any and all loss he might, at the time of said Joseph McDonough's discontinuance in said business, have sustained by reason of rejecting the offer of said firm and remaining with and serving said Joseph McDonough, said bequest by last will to be in addition to and independent of the salary to be paid to plaintiff for his services." Plaintiff

further averred the fulfillment upon his part of all the terms and conditions of his contract, the discontinuance of McDonough in business by reason of his death, and his failure to make any bequest to plaintiff in his will. He alleged: "That the said firm hereinbefore referred to established a successful business, and that the value of the assets, goodwill, and business of the firm was, at the time of the death of said Joseph McDonough and his discontinuance of said business, of great value, to wit, of the value of \$60,000." It is next averred that the loss sustained by plaintiff is the sum of \$12,000. The prayer of the complaint is for a decree compelling the executor of the estate of Joseph McDonough specifically to perform his testator's contract.

The demurrer was both general and special. It was sustained, ~~and~~ and from the judgment entered in defendant's favor plaintiff appealed.

Many propositions are urged in argument against this complaint—propositions presented under special demurrers for uncertainty and ambiguity. A point of some importance is made upon a variance between the contract set forth in the claim presented to the executor and the contract pleaded in the complaint. Upon none of these questions do we deem it important to touch, for the reason that the contract is not one for a breach of which a recovery may be had at law, nor one which may be enforced in equity, as is here sought to be done, and, therefore, the general demurrer was properly sustained.

There is no question but that a man may make a valid agreement binding himself to dispose of his property by last will and testament in a particular way, and a court of equity will under certain circumstances enforce such an agreement. That question has recently been considered at some length by this court, and it is not necessary to do more than refer to the case of *Owens v. McNally*, 113 Cal. 444.

No agreement can be enforced the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable: Civ. Code, sec. 3390, subd. 6. Before any such contract as this will be entertained by a court of equity, its terms must not only be fair, but free from doubt. Here it may not be determined what the liability of McDonough was, assuming, as of course we do, the truth of all issuable matters which are well pleaded.

If plaintiff had represented to McDonough that he intended to commence business for himself, and McDonough had

answered: You remain with me and I will make good to you whatever you may lose by not leaving me, no one would doubt that McDonough's offer was one which could not be measured or enforced. It could not be told whether the prospective business would or would not prove successful.

The actual case here presented is not essentially different. McDonough was to make good all loss which plaintiff might sustain by not entering the firm. How can that be measured, determined, or ascertained? Partnership dissensions might have arisen the next day, and a dissolution ³⁹⁹ might have followed. Plaintiff, as a partner, might have increased the volume and value of the business enormously, or by some unfortunate venture he might have wrecked it. The fact that the partners succeeded in establishing a successful business does not lead to any logical conclusion that the same result would have followed had another member been admitted to the firm. Appellant relies upon the case of *Bayliss v. Estate of Pricter*, 24 Wis. 651; but the differences between that and the case at bar are too radical to make it of assistance to him. There plaintiff sued for the reasonable value of his services under an agreement with his employer by which he was to be compensated in part by a testamentary bequest. The court took evidence, fixed the value of the services, and rendered judgment for the difference between what they were worth and what plaintiff had received. In this no doubt or uncertainty existed. But here plaintiff is not suing for the value of his services, but to enforce a contract whereby he was to be paid some undetermined and undeterminable sum of money. The same reasons of uncertainty and doubt which prevent equitable relief forbid the recovery of damages at law. Since plaintiff can never show how much he lost, or that he lost anything, he never can show that he has been damaged. The case is more like that of *Graham v. Graham*, 34 Pa. St. 475, where the parol agreement was to give to plaintiff for services to be rendered "as much as to any relative on earth." The court asks: "How much did decedent promise to give? The amount is uncertain, and from the nature of the arrangement is incapable of being rendered certain."

The judgment is affirmed.

McFarland, J., and Temple, J., concurred.

SPECIFIC PERFORMANCE—REQUISITE CERTAINTY—
AGREEMENT TO MAKE WILL.—A contract to be specifically enforced must be certain in every part: *Rankin v. Maxwell*, 2 A. K. Marsh. 488; 12 Am. Dec. 431. Its terms must be clear and def-

nitely ascertained: *Robbins v. McKnight*, 5 N. J. Eq. 642; 45 Am. Dec. 406; monographic note to *Atwood v. Cobb*, 26 Am. Dec. 661-671. An agreement to make a certain division of property by will, upon sufficient consideration, is valid, and may be enforced in a court of equity against the estate of the decedent, if not complied with: *Green v. Broyles*, 3 Humph. 167; 39 Am. Dec. 156. See *Kofka v. Rosicky*, 41 Neb. 328; 43 Am. St. Rep. 685, and note; *Nowack v. Berger*, 183 Mo. 24; 54 Am. St. Rep. 668; *Quinn v. Quinn*, 5 S. Dak. 328; 49 Am. St. Rep. 875; *Kauss v. Rohner*, 172 Pa. St. 481; 51 Am. St. Rep. 762. Compare *Shahan v. Swann*, 48 Ohio St. 25; 29 Am. St. Rep. 517.

STUDER v. SOUTHERN PACIFIC COMPANY.

[121 CALIFORNIA, 400.]

NEGLIGENCE—DUTIES AND RIGHTS AT THE INTERSECTION OF A RAILWAY AND A PUBLIC HIGHWAY.—A person attempting to use a public street and employes in charge of a railway train rightfully therein must each exercise his right with a proper reference to the rights of the other, but an interference by one with the other in the exercise of his right does not confer upon the other the right to disregard the proper mode of using the street. The right to do an act does not include the right to do it carelessly.

NEGLIGENCE—CONTRIBUTORY.—Though a railway train improperly blocks a street, or remains standing therein for an unreasonable time, a person is not, for that reason, authorized to incur unnecessary risk in seeking to cross the street, but is still required to exercise such prudence as would ordinarily be required of one seeking to pass between the cars of a standing train which is liable to move at any moment.

NEGLIGENCE, AS A MATTER OF LAW, must be inferred from an attempt to pass between the cars of a train which is liable to move at any instant, without taking any precaution to avoid danger. This rule applies to a child twelve years of age.

NEGLIGENCE—A CHILD TWELVE YEARS OF AGE is guilty of negligence in attempting to pass between the cars of a train standing on a public street; for a child is required to exercise the same degree of care which children of his age ordinarily exercise, and a court is authorized to determine what this degree of care is.

NEGLIGENCE—PROXIMATE CAUSE.—The failure of a person in charge of a train of cars standing on a public street to give notice that it is about to move is not the proximate cause of injury to a person attempting to pass between such cars; and, if injured, he cannot recover because of such failure, for he is himself not free from fault or negligence.

Joseph Craig, R. J. Hudson, and Shortridge, Beatty & Brittain, for the appellant.

George A. Lamont, for the respondent.

401 HARRISON, J. Plaintiff brought this action to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. At the close of the plaintiff's

testimony the court granted a nonsuit, and from the judgment thereon the plaintiff has appealed.

The facts shown at the trial are as follows:

On the 22nd of July, 1895, the defendant was moving a freight train of about fifteen cars, loaded with basalt ⁴⁰² blocks, and on arriving at Cordelia station the train stopped. The track of the defendant at this station runs parallel with Main street, and directly south of it. Near the station there is another street which intersects Main street at right angles, and when the train was stopped it stood directly across this intersecting street—the locomotive and two or three cars being to the east of it—and the travel into it from Main street was thereby obstructed. After the train had stood in this position eight or ten minutes, the deceased, a child between twelve and thirteen years old, came along Main street from the west, as far as the intersection of the other street, and after waiting there two or three minutes attempted to cross the train between two of the cars, and while in the act of climbing over the coupling the train started backward without giving any notice by bell or whistle, and he was injured by being crushed between the cars, and subsequently died from the injuries so received. Whether the court properly granted the nonsuit depends upon whether it appeared from the testimony on the part of the plaintiff that the deceased was guilty of negligence.

The place where the injury was received was a public highway, and the deceased is not to be regarded as a trespasser by reason of his attempt to cross the street while it was obstructed by the defendant's cars. Nor was a temporary obstruction of the street, by stopping the train, in violation of any right of the deceased, since the defendant was also entitled to use the crossing as a part of its right of way. Each was required to exercise his right with a proper reference to the rights of the other, but an interference by one with the other in the exercise of his right did not confer upon the other the right to disregard the proper mode of using the street. The right to do an act does not authorize a person to do it carelessly. If the defendant improperly blocked the street, or allowed its train to remain upon the crossing for an unreasonable length of time, the deceased was not, for that reason, authorized to incur unnecessary risk, or to act negligently in seeking to cross the street, but was still required to exercise such prudence as would ordinarily be required of one seeking to pass between the cars of a standing train which was liable to move at any moment. An attempt

to pass between the cars of a train that is liable to move ⁴⁰³ at any instant, without taking any precaution to avoid danger, is itself an act of negligence, when decided by the standard of common prudence, and has been so held by courts whenever the occasion has been presented; and the act is equally negligent whether it is done at a street crossing or elsewhere. "The fact that a train of cars is unlawfully blocking a crossing is no reason why a person should throw himself under the wheels, or recklessly expose himself to danger. He is bound, notwithstanding such acts of negligence, to exercise proper care and prudence, and if he fails to do so he cannot hold another responsible for an injury which may be fairly traced to his own negligence:" *Lewis v. Baltimore etc. R. R. Co.*, 38 Md. 588; 17 Am. Rep. 521. In *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376, under a state of facts greatly resembling those in the present case, the court said: "The attempt thus to pass between the cars of a train which he must have known was liable to be moved, cannot be classed as less than negligence. It borders on recklessness." In *Hudson v. Wabash etc. Ry. Co.*, 123 Mo. 445, the plaintiff attempted to climb over and between two flat cars which had obstructed the crossing of a public street for a longer time than was permitted by the municipal ordinance on the subject, and was injured by the sudden moving of the train without any warning or signal. The court said: "In climbing over the cars he put his feet in such a position that they were bound to be caught if the cars moved. He knew at the time that the cars had been standing there longer than was permitted by the ordinance. They were likely to move at any time and should have moved before that time. In getting over the cars in the way plaintiff attempted to do, he must be held to have taken the obvious risks involved in that act." In *Lake Shore etc. Ry. Co. v. Pinchin*, 112 Ind. 592, the plaintiff was injured while passing between two cars forming a part of a freight train standing across a public street. The court said: "A person who has knowledge that a train of cars is stopping temporarily at a way station on its way to its destination, has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it. . . . In this case the risk of passing between the cars, likely to get under way at any moment, was such as no one could assume without being guilty ⁴⁰⁴ of negligence. This is one of the cases where it must be declared, as a matter of law, that the risk is so great that no one who has a knowledge of the danger has a right to assume it."

The same principle is sustained in *Andrews v. Central R. R. Co.*, 86 Ga. 192; *Pannell v. Nashville etc. R. R. Co.*, 97 Ala. 298; *Magoon v. Boston etc. R. R. Co.*, 67 Vt. 177; *Corcoran v. St. Louis etc. Ry. Co.*, 105 Mo. 399; 24 Am. St. Rep. 394; *Wallace v. New York etc. R. R. Co.*, 165 Mass. 236; *O'Mara v. Delaware etc. Canal Co.*, 18 Hun, 192; *Howard v. Kansas City etc. R. R. Co.*, 41 Kan. 403.

The fact that the deceased was only about twelve years of age did not require the court to submit to the jury whether his attempt to cross the street between the cars constituted negligence. Negligence is the want of such care as a person of ordinary prudence would exercise under the circumstances of the case. When the facts are clear and undisputed, and when no other inference than that of negligence can be drawn from them, the court is not required to submit the question to the jury, but may itself make the inference: *Nagle v. California Southern R. R. Co.*, 88 Cal. 86. The court may also determine whether an act is such as would be performed by a person of ordinary prudence, or whether in the common judgment of mankind it would be deemed dangerous or attended with peril. The same act which would be negligence in an adult may not be such if done by a child, but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise: *State v. Baltimore etc. R. R. Co.*, 24 Md. 84; 87 Am. Dec. 600; *Collins v. South Boston R. R. Co.*, 142 Mass. 301; 56 Am. Rep. 675; and the court is as fully authorized as a jury to determine what this degree of care is. Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless. "The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity:" *Merryman v. Chicago etc. R. R. Co.*, 85 Iowa, 635. In the present case the capacity and intelligence of the child are not controverted, and ⁴⁰⁵ he must be presumed to have had all the qualities ordinarily belonging to a person of his age.

The failure of the defendant to give notice that the train was about to start is not available to the plaintiff. This was not the proximate cause of the injury, as might have been the case had the deceased sought to cross the street directly in front of

the locomotive, or at the rear of the train. As was said in *O'Mara v. Delaware etc. Canal Co.*, 18 Hun, 192: "The injury could not have occurred except for plaintiff's act in undertaking to climb over the train between the cars. It was for the court to determine whether that was negligence which contributed to the injury, and, as other courts have said, no one could doubt it was. Nor is it of importance that defendant was guilty of wrong or negligence in blocking up the way, or in starting its train suddenly and without notice. The defendant is not liable for the injury sustained by plaintiff, unless it occurred solely by its fault and negligence, and not in any degree through the fault or negligence of the plaintiff." See, also, *Railroad Co. v. Houston*, 95 U. S. 697; *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376.

The judgment is affirmed.

Van Fleet, J., McFarland, J., Temple, J., and Henshaw, J., concurred.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing.

RAILROADS—RELATIVE RIGHTS OF, AND PERSONS AT CROSSINGS.—The rights of a traveler and of a railroad company upon a highway crossing are equal in a sense: *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638; *Wilson v. Southern Pac. Co.*, 13 Utah, 352; 57 Am. St. Rep. 766. But the fact that a railroad company allows cars to stand at a crossing, obstructing a street in violation of law, does not give a person the right to climb over such cars without looking to see if they are attached to an engine or not. Such act is contributory negligence: *Corcoran v. St. Louis etc. Ry. Co.*, 105 Mo. 399; 24 Am. St. Rep. 394, and note; *Bollinger v. Texas etc. Ry. Co.*, 47 La. Ann. 721; 49 Am. St. Rep. 379.

RAILROADS—INJURY TO INFANTS ATTEMPTING TO CROSS STATIONARY CARS—QUESTIONS OF FACT AND LAW.—The rules of negligence applicable to infants have been the subject of much disagreement. Many general principles are well settled, but the exceptions to them are sometimes more important than the principles themselves. The holding of the principle case that an infant attempting to cross between stationary cars at a railroad crossing forfeits his right to recover for an injury thereby received is supported by *Bollinger v. Texas etc. Ry. Co.*, 47 La. Ann. 721; 49 Am. St. Rep. 379; *Corcoran v. St. Louis etc. Ry. Co.*, 105 Mo. 399; 24 Am. St. Rep. 394; *Burger v. Missouri Pac. Ry. Co.*, 112 Mo. 238; 34 Am. St. Rep. 379. The question as to when a child reaches an age at which he is deemed capable of exercising judgment and discretion is from its very nature incapable of arbitrary settlement. A child may be of such tender years that the court may, as a matter of law, adjudge him incapable of contributory negligence, or he may be so advanced in intelligence and age that the court may, under proper circumstances, hold him guilty of contributory negligence without submitting the question to the jury; but while both of

these points are vaguely located, there lies between them a much more shadowy stretch of years at which it is proper and necessary to submit the question to the jury in a given case whether or not, considering the age of the child, its surroundings and the circumstances of the case, it has been guilty of contributory negligence forfeiting its right to recover. See monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 406-433. Such question has been submitted to the jury when the injured person was less than eight years old: Consolidated Traction Co. v. Scott, 58 N. J. L. 682; 55 Am. St. Rep. 620; Lorence v. Ellensberg, 13 Wash. 341; 52 Am. St. Rep. 42; nine years: Railroad Co. v. Mackey, 53 Ohio St. 370; 53 Am. St. Rep. 641; ten years: Avey v. Galveston etc. Ry. Co., 81 Tex. 243; 26 Am. St. Rep. 809; between thirteen and fourteen years; Strawbridge v. Bradford, 128 Pa. St. 200; 15 Am. St. Rep. 670; Cook v. Houston etc. Nav. Co., 76 Tex. 353; 18 Am. St. Rep. 52; between ten and fourteen: Rhodes v. Georgia etc. R. R. Co., 84 Ga. 320; 20 Am. St. Rep. 362.

MARCH v. BARNET.

[121 CALIFORNIA, 419.]

SUBROGATION—MAKER AND INDORSER.—If the property of the maker of a note is attached in an action against him and his indorser, and an undertaking is thereupon given for the release of such property, conditioned that the sureties will pay any judgment which may be recovered against such maker, they cannot, on paying the judgment, be subrogated to any right not possessed by their principal. Hence they cannot take an assignment of the judgment and enforce it against such endorser.

JUDGMENT—LIABILITY FOR ACTS DONE AFTER PAYMENT OF.—If a judgment is paid by a surety of one of the defendants, and thereafter he and others seize and sell property in pretended satisfaction of it, their acts constitute a naked trespass, for which all are jointly and severally liable.

STARRE DECISIS.—A construction of the complaint by the supreme court on the appeal of one of the defendants, is not conclusive on the appeal of the other defendants, wherein it appears that they are liable to the plaintiff, and the appellant in the prior appeal is not.

PRACTICE—MISJOINDER—WAIVER OF.—A contention by a number of defendants that "the demurrer should have been sustained as to these respondents" is merely an attack upon the ground that the facts stated in the complaint do not constitute a cause of action against them, and does not present the question whether they were improperly joined with another defendant.

W. D. Storey, for the appellant.

Z. N. Goldsby, for the respondents.

420 VAN FLEET, J. When this cause was in department an opinion was rendered affirming the judgment, but subsequently the judgment of the Department was set aside and the cause ordered to a hearing in Bank.

The action is to recover for the alleged wrongful taking of certain personal property of the plaintiff. The material facts, as found by the court, were these:

⁴²¹ In October, 1890, O. M. Button brought an action against Jacob Steen and John Ross and W. F. March, the plaintiff herein, on a promissory note made by said Steen payable to John Ross, or order, and by him indorsed to plaintiff March, who in return, before maturity, indorsed the same to Button. A writ of attachment issued in said cause, which was levied upon the property of defendant Jacob Steen.

Thereupon S. Barnett and one G. Bowman entered into an undertaking for the release of said attached property, as prescribed by section 540 of the Code of Civil Procedure, whereby they undertook and agreed to pay any judgment plaintiff in that action might obtain against the defendant Steen, whereupon the attachment was released.

Button obtained judgment in that action against Steen as maker of said note, and March as indorser thereof, for six hundred and twenty-five dollars and ninety-seven cents and costs, the suit having been dismissed as to defendant Ross; the findings upon which the judgment was based expressly disclosing the fact that Steen was the maker and March an indorser of the note.

On April 18, 1892, Barnett paid that judgment to Button and took an assignment of it. On May 17, 1892, defendant Barnett assigned the judgment to defendant Isaac Blum, who on May 31, 1892, assigned it to Joseph Blum, having first taken out an execution and placed it in the hands of the sheriff of San Francisco, instructing him to seize and sell the interest of March in the schooner "Ingalls," which, under the further direction of Joseph Blum, the sheriff proceeded to do, selling said property to said Joseph Blum on May 28, 1892, for seven hundred and seventy dollars, which interest was then and there of the value of one thousand dollars. Before making the sale the sheriff demanded an indemnifying bond, which was given by defendants Isaac Blum, Joseph Blum, and J. H. Jacobs. Joseph Blum transferred his purchase to J. H. Jacobs on the day of the sale, and Jacobs at once took possession of the same, and held it at the commencement of the action. At all these times, from the payment of the Button judgment by Barnett until the sale and transfer of March's interest in the schooner, each of the defendants S. Barnett, Isaac Blum, Joseph Blum, ⁴²² and J.

H. Jacobs had full notice of the relation sustained by said S. Barnett to that judgment, as surety for Steen; and said transfers from Barnett to Isaac Blum, from Isaac Blum to Joseph Blum, and from Joseph Blum to Jacobs, were made with the intention on the part of each of them "to have said property of plaintiff seized under said execution and sold so as to protect said Steen against said judgment, and to reimburse said S. Barnett for the amount paid by him to said O. M. Button when he took said assignment."

Upon these findings the court below gave plaintiff a judgment as against defendant Steen for nine hundred and forty-three dollars and forty-one cents, and costs, but denied him any relief as against defendants S. Barnett, Isaac Blum, Joseph Blum, and J. H. Jacobs—the action having been theretofore dismissed as to defendant Laumeister.

Plaintiff appeals from so much of the judgment as is in favor of the defendants Barnett, the Blums, and Jacobs, the appeal being upon the judgment-roll, without a bill of exceptions.

In the Department opinion it was assumed that by his undertaking to release the attachment in Button v. Steen et al., Barnett obligated himself on behalf of both Steen and March to meet any liability which should be cast upon them, or either of them, by the judgment in that case; and this assumption of fact dominated the conclusion there reached. Were such the case, the reasoning of that opinion—that upon paying the judgment in that case Barnett became subrogated to the rights of Button, the judgment creditor, as against both Steen and March, and entitled to enforce it indifferently against either—would be logical and the conclusion reached obvious.

But it is quite apparent that the assumed existence of the fact upon which that theory of the case rests is based upon a misapprehension of the findings. The findings do not show that Barnett became obligated upon behalf of both Steen and March; to the contrary, they show very clearly that the undertaking given by Barnett was given solely at the request and for the benefit of Steen, and to release his property, and that the obligation Barnett assumed thereby was only that in case the plaintiff in the action, Button, "recovered judgment therein ⁴²³ against said Jacob Steen," he would on demand pay, et cetera. There was nothing in the terms of the undertaking, or the relation of the parties, which, either as a matter of fact or matter of law, made Barnett responsible for any obligation

of March, or which in any way made March a party to Barnett's undertaking. The undertaking made Barnett the surety of Steen, but it created no obligation or privity between Barnett and March. And while in becoming Steen's surety Barnett thereby made himself a party to the judgment and became bound to pay it upon Steen's default (Brandt on Suretyship and Guaranty, sec. 408; Freeman on Judgments, sec. 180; Black on Judgments, 587; Riddle v. Baker, 13 Cal. 296, 306), as between himself and March he remained a stranger to the judgment.

When, therefore, Barnett paid the judgment, he was performing solely the obligation of his principal, Steen, and his right to subrogation was confined to the rights of the judgment creditor as against Steen; and he was entitled to look for reimbursement only to the latter. In other words, as put in the books, he "stood in the shoes" of his principal, and he had precisely the same rights which the latter would have had, and none other: Civ. Code, sec. 2847; Freeman on Judgments, secs. 470, 471; Brandt on Suretyship and Guaranty, secs. 242, 260, 270; Fitch v. Hammer, 17 Colo. 591.

It is obvious that, had Steen himself paid the judgment, he could not have looked to March for reimbursement. While as to Button they were equally liable, as between themselves Steen, as maker of the note, was ultimately responsible to March: March v. Barnett, 114 Cal. 375. Since, therefore, Steen would have had no right to enforce the judgment against the plaintiff March, neither had Barnett such right: Brandt on Suretyship and Guaranty, sec. 227, and authorities above cited.

Consequently, when the property of plaintiff was seized and sold in pretended satisfaction of such judgment for the reimbursement of Barnett, the taking was clearly unlawful, and constituted a naked trespass in those participating therein, for which they were jointly and severally liable to plaintiff in the full value of the property taken: Lewis v. Johns, 34 Cal. 629; Weber v. Ferris, 37 How. Pr. 102; Lovejoy v. Murray, 3 Wall. 1; Davis v. Newkirk, 5 Denio, 92.

⁴²⁴ As the findings show that all of the respondents participated in said taking, the plaintiff was clearly entitled, under the facts found, to a judgment against them for the value of the property, with interest from the date of the taking. In fact, had he asked it, plaintiff would have been entitled to a judgment for punitive damages, since respondents are found to have

had full knowledge of the relation of Barnett to the judgment which they procured to be enforced, and were also charged with notice of plaintiff's rights in the premises. The taking was, therefore, to be regarded as malicious.

Respondents make the point that on a former appeal in this case (*March v. Barnett*, 114 Cal. 375) this court construed the action as being merely one for contribution by March, a surety, against Steen, the principal, in which it was held that March was entitled to recover against Steen only to the extent that the proceeds of his property had been applied toward the satisfaction of the judgment against Steen; and, say the respondents, the construction given to the complaint on that appeal is the law of the case, and, the action having been held to be one of the character indicated, no recovery can be had therein against these respondents. But there was nothing decided on that appeal which in any way conflicts with or militates against the conclusion that we reach on this, and the doctrine of the law of the case may not be invoked. That was an appeal by Steen from the judgment which was rendered against him as above stated, and all that this court was then dealing with was the rights as between the plaintiff here and Steen. What was there held as to the liability of Steen was clearly proper, since the findings do not show that he participated in the unlawful taking of plaintiff's property, and he was, therefore, not answerable in tort. The question as to the sufficiency of the pleadings or findings to authorize a judgment against these respondents was not before the court on that appeal, and was in no way considered; nor did the court pretend to fix the character of the action as against these respondents.

There was no objection taken by the demurrer of a misjoinder of causes of action, and the respondents have not pressed their demurrer on the ground of misjoinder of parties defendant. ⁴²⁵ Their entire argument in support of their demurrer is that "the demurrer should have been sustained as to these respondents." We construe this as an attack only upon the general ground of a want of facts; and, manifestly, the demurrer was properly overruled upon that ground.

The other points made by respondents are sufficiently answered by what is said above in the discussion of the merits.

The judgment in favor of respondents is reversed and the cause remanded, with directions to the court below to enter

judgment for plaintiff upon the findings against said respondents for one thousand dollars, found to be the value of the property, together with legal interest from the date of the taking, and for costs of the action and of this appeal.

Harrison, J., Garoutte, J., McFarland, J., Temple, J., and Beatty, C. J., concurred.

SUBROGATION—PRINCIPAL AND SURETY.—A surety on paying the debt of the principal, is entitled to be put in the place of the creditor, and to avail himself of all or any of the collateral securities, means, or remedies which the creditor has of enforcing payment against his principal: Note to *Peebles v. Gay*, 44 Am. St. Rep. 433. A surety who pays a judgment against his principal, and has it entered "satisfied" without having it assigned to a trustee for his benefit, thereby loses his remedy of subrogation to the rights of the creditor as against his principal and a co-security: *Peebles v. Gay*, 115 N. C. 38; 44 Am. St. Rep. 429. He has no right to be put in a better position than his creditor: *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253; 23 Am. St. Rep. 89. Compare *Neilson v. Fry*, 16 Ohio St. 552; 91 Am. Dec. 110.

SUBROGATION—ENFORCEMENT OF JUDGMENT BY SURETY WHO HAS BEEN SUBROGATED TO LIEN THEREOF.—A surety who pays a judgment and is thereby subrogated to the rights of the creditor against the principal debtor, may issue execution on the judgment in the name of the creditor for the amount which he has paid as surety: *Connely v. Bourg*, 16 La. Ann. 108; 79 Am. Dec. 568, and note. But in *Uzzell v. Mack*, 4 Humph. 319, 40 Am. Dec. 648, it is held that a surety discharging a bond or judgment which is the only security the creditor has taken, has nothing to which he can be subrogated.

APPEAL—DECISION OF PRIOR APPEAL—LAW OF CASE.—While it is true that the rulings of a court upon a prior appeal are ordinarily irrevocable and settle the law of the case, to the enforcement of this rule it is essential that the law as stated on the first appeal be applicable to the facts appearing on the second: *Louisville etc. R. R. Co. v. Offutt*, 99 Ky. 427; 59 Am. St. Rep. 467, and note.

BERLINER v. TRAVELERS' INSURANCE COMPANY.

[121 CALIFORNIA, 458.]

INSURANCE—ACCIDENT—CONSTRUCTION OF POLICIES.—When the terms of a policy permit more than one construction, that will be adopted which will support its validity, and favor the insured.

INSURANCE—ACCIDENT—INJURY WHILE RIDING ON A LOCOMOTIVE.—A condition in a policy of insurance applicable to persons riding in any passenger conveyance using steam, cable, or electricity as a motive power, applies to a person riding on the locomotive of a passenger train, and his right of recovery is the same as if riding on less dangerous parts of the train. He may, therefore, recover double the amount for which the insurer would have been liable if the injuries had been suffered elsewhere, if the

policy provides for such increased recovery in favor of persons injured while riding on a passenger conveyance.

INSURANCE—ACCIDENT—HAZARDOUS OCCUPATION OR EXPOSURE.—A condition exempting the insurer from liability if the insured is injured in any occupation or exposure classed by the company as more hazardous than that here given, does not apply to individual acts, but only to employments. Hence, the fact that the insured was injured while riding on the locomotive of a passenger train, though that position is more dangerous than any involved in his regular occupation, does not relieve the insurer from liability.

Daniel Titus, for the Appellant.

Olney & Olney, for the Respondent.

459 HAYNES, C. Action upon a policy insuring George Berliner, the husband of plaintiff, against death caused by accident. At the conclusion of plaintiff's evidence defendant moved for a nonsuit, the motion was granted, and from the judgment entered thereon the plaintiff appeals.

Said policy insured said Berliner against loss of time resulting from bodily injuries affected through external, violent, and accidental means, and classifies the injuries and the compensation for loss of time. It then provides: "(e) Or if death results from such injuries alone within ninety days, it will pay ten thousand dollars to Mary I. Berliner, his wife, if surviving; in event of her prior death, to the legal representatives or assigns of insured; (f.) If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum above specified; provided, if insured is injured in any occupation or exposure classed by this company as more hazardous than that here given (that of mining expert), his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard."

The policy then proceeds to qualify its liability by specifying what is not covered by it as follows:

"This insurance does not cover disappearance,....nor accident nor death,....resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Disease or bodily infirmity violating law; voluntary exposure to unnecessary danger; entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable and electric street cars), being in or on any such conveyance not provided for transportation of passengers, or on a railway bridge or roadbed (railway employes excepted)."

The insured received injuries in a railway accident in Mexico, from which he died four days afterward. The only evidence as to the circumstances connected with the accident was the testimony of S. W. Ferguson, who accompanied Mr. Berliner to Mexico and was traveling with him at the time of the accident.

The witness and Mr. Berliner were invited by the superintendent of the railway to go from the city of Mexico to Puebla ⁴⁶⁰ and return. Mr. Cokefield, superintendent of motive power on that road, an old acquaintance of Mr. Berliner, was with the party. On the return trip the train consisted of a locomotive, a baggage-car and three or four passenger-cars, and the superintendent's car, which was at the rear end of the train. While at a station Mr. Cokefield invited Mr. Berliner to go with him to the engine that he might better see the country, and they started toward the engine, and the witness returned to the superintendent's car. In going down the grade the train acquired a great velocity, and, leaving the track, was wrecked. The engineer, fireman and conductor were killed, and he thought about a half dozen of the passengers. He found Mr. Berliner in the wreck of the engine, near the firebox, and burned by escaping steam, and believed Berliner was on the engine at the time of the accident. On cross-examination, he testified that he advised Mr. Berliner not to go on the engine, that he would get his clothes dirty, that he could see as well from the car, and that he thought it was not a safe place, but that he might or might not have used the word "safe," that the conversation was jocular, but he desired to detain him.

The foregoing is the substance of the testimony relating to the accident.

The ground of the motion for a nonsuit was: "That the contract itself did not provide for the death of a party by an accident while riding upon a locomotive, but only in a conveyance intended for passengers."

Assuming that Mr. Berliner was upon the engine at the time of the accident, and we think the court might properly find that he was, defendant's contention is, that Mr. Berliner was at the time of the accident on "a conveyance not provided for the transportation of passengers," and that therefore the defendant is not liable; while appellant contends that the train on which the insured was riding was a regular passenger train composed of a locomotive and cars, and formed a conveyance for the transportation of passengers, and that the policy did not exclude him from any part of it.

It is well settled that policies of insurance should be liberally construed in favor of the insured; that where its terms permit of more than one construction that will be adopted which supports ⁴⁶¹ its validity. In *Equitable etc. Ins. Co. v. Osborn*, 90 Ala. 201, 207, it was said: "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy."

In *Accident Ins. Co. v. Crandall*, 120 U. S. 527, it was held that "a policy of insurance against 'bodily injuries, effected through external, accidental, and violent means,' and occasioning death or complete disability to do business, and providing that 'this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries,' covers a death by hanging one's self while insane." It was there said that "the insane suicide no more dies by his own hand than the suicide by mistake or accident;" and that the words "bodily infirmities or disease" do not include insanity, and that it is "the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who frame them." To this we may add that the general rule is that exceptions and conditions are to be construed strictly against the party in whose favor they are made.

In a New York case it was said: "It has become a rule of law that if it be left in doubt whether words of the contract were used in an enlarged or restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee." *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 430.

In *Healey v. Mutual etc. Assn.*, 133 Ill. 556, 23 Am. St. Rep. 637, it was held that a death caused by accidentally taking and drinking poison is a death produced by bodily injuries received through external, violent, and accidental means.

Many other cases might be cited illustrating and applying the rule of construction above stated, but the rule is so well settled that we deem it unnecessary.

The policy here in question, though of a preferred class, was not special, covering only accidents to the insured while en-

gaged ⁴⁶² in a designated employment, pursuit, occupation, or situation, but covered any possible accident which might happen to any one under any or all circumstances, provided it did not fall within an exception expressed in the policy.

The term "conveyance" applies as well to the means of transporting freight as of passengers, and in the clause exempting the insurance company from liability for accidents occurring in "entering or trying to enter or leave a moving conveyance using steam as a motive power" is so applied; while the clause here under consideration distinguishes a "conveyance provided for the transportation of passengers" from those used for the transportation of freight. Neither clause specifies railroad trains, and each includes as clearly vessels propelled by steam. If the insured had met with an accident upon a passenger steamer instead of a railroad train, upon what part of the vessel must he have been at the time of the accident to be within the protection of his policy? Must he be seated in the cabin, or occupy a stateroom? The policy does not say so. It restricts him to no part of the vessel, and therefore if the insurance company sought to escape liability by showing that at the time of the accident he was not in the cabin or a stateroom, it must import into the contract a qualification or provision which is not expressed or even implied.

That the locomotive is part of the "conveyance" provided for the transportation of passengers upon a railroad is not disputed. If the deceased had been killed in trying to enter or leave the engine of a freight train, the defendant here would hardly concede its liability upon the ground that it was no part of "a moving conveyance," and therefore not within the clause exempting it from liability. Upon the theory that the engine is not part of the conveyance, it would follow that if A were killed in attempting to get on a car of a moving passenger train the insurance company would not be liable, while if B were killed in attempting to get upon the engine of the same train at the same moment the insurer would be liable.

If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used. As, for example, in *Hull v. Equitable etc. Assn.*, 41 Minn. 231, the policy contained the following provision: ⁴⁶³ "Standing, being or riding upon the platform of moving railway coaches (other than street cars), or riding in any other place not provided for the trans-

portation of passengers, . . . are hazards not contemplated or covered by this certificate."

The same provision is found in the policy considered in *Anthony v. Mercantile etc. Assn.*, 162 Mass. 354, 44 Am. St. Rep. 367; and a similar provision is found in a policy issued by still another company: See *Sawtelle v. Railway etc. Assur. Co.*, 15 Blatchf. 216.

That "a conveyance using steam as a motive power" includes railroad trains cannot be controverted. If then we insert "railroad trains" for or instead of conveyance, the meaning becomes clear. Thus: "Entering or trying to enter or leave a moving railroad train (except cable and electric street cars), being in or on any such moving railroad train not provided for transportation of passengers, or on a railroad bridge or roadbed (railway employees excepted)." Thus paraphrased, the only distinction made is in the character of the trains, and not as to different parts of a train. In the first clause, in regard to entering or leaving trains, all trains are included; while under the second clause passenger trains are distinguished from freight, repair, wrecking and other trains "not provided for the transportation of passengers." These exceptions, therefore, literally interpreted, have no application or reference to passengers or passenger trains except as to entering, or trying to enter or leave any train, whatever its character, while in motion, and therefore some term or condition not expressed in the policy must be imported into it to work a forfeiture and relieve the defendant from liability, and that is not permissible.

It follows from this conclusion that plaintiff's right to recover under clause "e" or "f" of the policy is clear, unless such right is barred by No. 1 of the provisos. That proviso is as follows: "If insured is injured in any occupation or exposure classed by this company as more hazardous than that here given, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard."

In *Stone v. United States Casualty Co.*, 34 N. J. L. 371, a similar provision in an accident policy was considered. It was ~~464~~ there said: "The injuries excluded from the compensation of the policy are described as those that are 'received in any employment, or by any exposure either more hazardous in itself or classified by the company as more hazardous.' These terms, literally rendered, require that the assured, to come within their ef-

fect, must, at the time of the injury, be in an employment more dangerous than his own. The language has reference to employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression 'other exposure,' but looking at the body of the policy we find these terms used in the sense of the risks arising from a business or occupation. By adhering to the literal signification of the terms employed, these indorsements prefixed to the several classes of employments lose all force as independent stipulations, and serve the simple purpose of graduating such employments for the service of that provision of the policy which prohibits the assured from passing, at his own option, from one business to another. Understood in this view they are properly a part of the classifications, but if they are to be received as containing new terms of the contract, they are entirely out of place. If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language. . . . A qualification so restive of the rights of the assured ought not to be admitted unless the terms of the indorsement will bear no other rational interpretation."

In that case the occupation of the insured was stated to be that of a teacher. While unemployed he was superintending the erection of a building for himself, and fell from the building by the breaking of a joist, and was killed, and the judgment against the company was affirmed.

In the case at bar, the policy did not provide that it covered only those accidents which might occur to the insured while actually engaged in the direct duties of a mining expert, but covered all accidents not excluded by the terms of the policy, the occupation being inserted only to show that it was within a ⁴⁶⁵ specified class of risks. See upon this point, and supporting the case last above cited, *Provident Life Ins. Co. v. Fennell*, 49 Ill. 180; *North American Life etc. Ins. Co. v. Burroughs*, 69 Pa. St. 43; 8 Am. Rep. 212.

Under the evidence contained in the record I think it perfectly clear that the plaintiff was at least entitled to judgment for ten thousand dollars under clause "e" of the policy, and the only remaining question is whether she was entitled to judgment for twenty thousand dollars under clause "f," which provides: "If such injuries are sustained while riding as a passen-

ger in any passenger conveyance using steam, cable or electricity as a motive power, the amount shall be double the amount above specified."

If Mr. Berliner had been riding on the train in any other capacity than that of a passenger, that is, as an employè of the railroad company, or an express or mail agent, or a tramp stealing a ride upon a brakebeam, the defendant would not be liable under clause "f." But he occupied no such relation to the railroad company or the train. Though upon the engine he was a passenger. That he did not lose his character as a passenger by going upon the engine at the request of an officer of the road, see *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 186; 5 Am. St. Rep. 510; *McGee v. Missouri Pac. Ry. Co.*, 92 Mo. 208; 1 Am. St. Rep. 706; *Nashville etc. R. R. Co. v. Erwin* (Tenn. 1882), 3 Am. & Eng. R. R. Cas. 465. These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word "passenger" as here used is evidently intended to designate the character or relation the insured sustained to the proprietor of the conveyance, and are therefore in point.

That the defendant cannot import into this clause of the policy conditions as to the part of the conveyance in which the insured must be, and thus by construction work a forfeiture, need not be further discussed. All that is required is that the insured shall be "riding as a passenger" in any passenger conveyance using steam, cable, or electricity as a motive power.

406 That portion of the judgment from which the present appeal is taken should be reversed.

Britt, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion that portion of the judgment from which the present appeal is taken is reversed.

Garoutte, J., Harrison, J., Van Fleet, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

INSURANCE—CONSTRUCTION OF POLICY.—Insurance policies must be liberally construed in favor of the assured, so as not to defeat without a plain necessity his claim for indemnity, and where words may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be

adopted: *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226; 59 Am. St. Rep. 411, and note.

INSURANCE—INJURIES RECEIVED IN TRAVELING—WHO ARE PASSENGERS.—Recovery may be had on an insurance policy against accident "while traveling by public or private conveyances provided for the transportation of passengers," where the insured in prosecuting a journey, while passing on foot by the usual route from a steamboat landing to a railroad station about seventy rods distant, slipped and fell, from which she received injuries resulting in death: *Northrup v. Railway Passenger Assur. Co.*, 43 N. Y. 516; 3 Am. Rep. 724. Compare *Bon v. Railway Passenger Assur. Co.*, 56 Iowa, 664; 41 Am. Rep. 127; *Anthony v. Mercantile Mut. Acc. Assn.*, 162 Mass. 354; 44 Am. St. Rep. 367. As to whether or not a person riding on the locomotive of a railroad train is a passenger as between himself and the company, see monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 79, 83, 84, 90, 91. Compare *King v. Travelers' Ins. Co.*, 101 Ga. 64; 65 Am. St. Rep. 288.

INSURANCE—ACCIDENT—OCCUPATION.—The word "occupation," when found in the by-laws or policies of insurance companies, must be held to have reference to the vocation, trade, or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are incidentally connected with the life of men in any or all occupations, or from engaging in mere acts of exercise, diversion, and recreation: *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228; 23 Am. St. Rep. 664, and note; note to *North American Life etc. Ins. Co. v. Burroughs*, 8 Am. Rep. 218. See *Holiday v. American Mut. Acc. Assn.*, 103 Iowa, 178; 64 Am. St. Rep. 170, and note.

HIGGINS v. HIGGINS.

[121 CALIFORNIA, 487.]

A LIEN ON ALL HUSBAND'S LAND OWNED BY HIM DURING LIFE, is created by a provision in an agreement of separation entered into in writing between him and his wife, stipulating for the payment to her of six hundred dollars annually, and that the payment of such sum shall be a continuing obligation, to constitute a lien upon his estate during his lifetime, and after his death, during the life of his wife.

LIENS—GENERALITY OF DESCRIPTION IN INSTRUMENTS CREATING.—A writing purporting to create a lien on all the estate of one of the parties thereto during his life is not invalid for want of definiteness of description; and if such writing is acknowledged and recorded in the manner required for instruments affecting the title to real property, all subsequent purchasers and incumbrancers of property of that class hold their interests subject thereto.

LIENS—DESCRIPTION—CONSTRUCTION OF.—A writing purporting to create a lien on all the estate of a party thereto must be so construed as to comprehend all that part of his property susceptible of being impressed with a lien, by a writing of that purport, executed and recorded in the manner in which it was.

N. H. Conklin, for the appellant.

A. H. Swett, for the respondent.

⁴⁸⁸ **BRITT, C.** Defendant H. M. Higgins and the plaintiff, Emily J. Higgins, husband and wife, entered into a contract in writing of date April 9, 1891, whereby they agreed, among other things stipulated, to live apart, and the husband agreed to pay the wife the sum of six hundred dollars per year during her life; such contract contained the following clause: "The payment of said annuity to be a binding and continuing obligation upon the said H. M. Higgins and upon his executors, administrators, and assigns, and to constitute a lien upon his estate during his lifetime, and after his death during the lifetime of the said Emily J. Higgins." The instrument was duly acknowledged and was recorded on November 12, 1894, in the office of the county recorder of San Diego county, in which county certain lands owned by said H. M. Higgins were situated. Subsequently, H. M. Higgins made to the defendant San Diego Savings Bank a mortgage of the lands aforesaid to secure his promissory note to the bank for the sum of five thousand dollars. Plaintiff sued in this action to recover arrears of the said annuity and to subject the said lands—particularly described in her complaint—to sale for the payment thereof. The court below held that plaintiff had a first lien on the land, in virtue of said contract with her husband and notice thereof to the said mortgagee, and rendered judgment accordingly. The bank appealed.

Appellant insists that the language of said contract is so uncertain for want of definite description of property to be affected that no lien was or could be created thereby, nor any notice of a lien imparted to subsequent encumbrancers. It must be allowed that considerable force of argument and some decided cases support this contention: See *Herman v. Deming*, 44 Conn. 124; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282; *Green v. Witherspoon*, 37 La. Ann. 751. But the prevailing judicial view, well enough justified, perhaps, in legal principle, is that deeds and mortgages describing the property to be conveyed or encumbered in terms essentially similar (for purposes of the question here) to those employed in the contract of Higgins and wife, are not void for want of greater particularity, but suffice to pass title or impose a charge according to the apparent intent, extrinsic evidence being admitted, under proper pleading, to ⁴⁸⁹ identify the property: *California Title etc. Co. v. Pauly*, 111 Cal. 122; *Pettigrew v. Dobbelaar*, 63 Cal. 396; *Wilson v. Boyce*, 92 U. S. 320; *Clifton Heights Land Co. v. Randell*, 82 Iowa, 89; *Leslie v. Merrick*, 99 Ind. 180; *Roehl v. Haum-*

esser, 114 Ind. 311; Wilt v. Harlan, 66 Tex. 660; Drew v. Carroll, 154 Mass. 181; Mobile etc. R. R. Co. v. Talman, 15 Ala. 472. The objection that the description of property must be specific in order to satisfy the definition of a mortgage in our statute (Civ. Code, sec. 2920) is met by the principle which pervades the cases cited that that is certain which is capable of being made certain. True, the term "estate" used in this contract to denote the subject of lien, has in law a diversity of meaning; but it should be understood here in the sense which will accomplish and not defeat the obvious purpose to create a lien, viz., to comprehend property susceptible of being impressed with a lien; as it was used without any qualification it included all the lands of the husband: Archer v. Deneale, 1 Pet. 585; Pulliam v. Pulliam, 10 Fed. Rep. 40. Failure to indicate the locality of the property was not fatal: McCullough v. Olds, 108 Cal. 529. It may be, as the court below ruled, that no lien was created against personalty; the contract was not executed in the manner of a mortgage of chattels under the statute; but in our opinion it was effectual to charge a lien on lands, and the judgment should be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J. Temple, J., Henshaw, J.

Conveying and Encumbering Property by a General Description.

The word "estate," when used in instruments whose purpose is to create a lien upon, or pass title to, property has a well-recognized signification. When unqualified and unrestricted, it is always construed to embrace every description of property, real, personal, and mixed: Pulliam v. Pulliam, 10 Fed. Rep. 40; Archer v. Deneale, 1 Pet. 583; Thornton v. Mulquinne, 12 Iowa, 549; 79 Am. Dec. 548; Boston v. Dedham, 4 Met. 178; Andrews v. Brumfield, 32 Miss. 107; Blewer v. Brightman, 1 McCrary, 60. A devise of the testator's estate generally passes both real and personal estate, and may include a debt and mortgage: Jackson v. DeLancy, 11 Johns. 365. The term "estate of a deceased person" signifies all the property of every kind that one leaves at his death: Jacks v. Bridewell, 51 Miss. 881; Rothschild v. Hatch, 54 Miss. 554. It is synonymous with "succession": New Orleans v. Stewart, 28 La. Ann. 180; Succession of Marks, 35 La. Ann. 1054; and with "property": Hunt v. Hunt, 4 Gray, 190; Succession of Marx, 35 La. Ann. 1054. "When the words 'property' and 'estate' have been held to be limited to personal property, we think it has been where these general terms were so connected or mixed with words expressing only things personal as to limit their meaning," says the court in Hunt v.

Hunt, 4 Gray, 190. These words are given their broadest signification only in the absence of some qualification expressed in the context, and such qualification may be either express or implied. It may be necessary to restrict their meaning in order to carry into effect the intention of a testator or of the parties to an instrument, or in order to protect accompanying equities.

Where the general expression "estate" is "collocated with words descriptive of personal estate," it may be restrained to subjects of the same species: Thornton v. Mulquinne, 12 Iowa, 549; 79 Am. Dec. 548; but the court will not favor such restriction in the absence of the approving intention of a testator: Andrews v. Brumfield, 32 Miss. 107. "It is true," says the court in Stump v. Deneale, 2 Cranch O. C. 640, "that there are many cases in which the word 'estate' in a will has been holden to convey real estate even in fee simple. But the clear doctrine resulting from all the cases upon the subject is that although the word 'estate,' taken independently of the context, by its own force denotes not only real as well as personal estate, but the highest degree of real estate, and the word 'property' carries of itself both real and personal property; while the word 'effects' is generally and properly applicable to personal estate only; yet that all these words—and, indeed, every other form of expression whereby a testator declares his will in respect to the disposition of his property—submit to the rule which requires a will to be construed agreeably to the intention of the testator where it can be collected from the whole will:" Den v. Snitcher, 14 N. J. L. 53; Brawley v. Collins, 88 N. C. 605. It is plain that the meaning of the word "estate" is no greater when qualified by "all," and a devise of "all my estate" may be restricted by subsequent specification: Goddard v. Brown, 12 R. I. 31. Thus, a devise of "all my landed estate," followed by a description of several tracts of land, will not pass a lot not described: Myers v. Myers, 2 McCord Eq. 214; 16 Am. Dec. 648. See, also, Farish v. Cook, 78 Mo. 212; 47 Am. Rep. 107. The words "all other property" in a mortgage following an enumeration of the properties covered by the mortgage may be limited and restricted by such enumeration: Alabama v. Montague, 117 U. S. 602.

A conveyance, devise, or mortgage of all of one's estate has been frequently upheld as containing a sufficient description. A gift in a will of residuary property and effects will pass lands not otherwise devised, and situated in another state from that of the testator's domicile: White v. Keller, 68 Fed. Rep. 796. A devise of all of one's estate is not void for uncertainty: Flannery v. Hightower, 97 Ga. 592; nor is a mortgage of "all the lands owned by the mortgagor": Leslie v. Merrick, 99 Ind. 180; nor a deed of assignment of all the lands of the grantor, of every description, wherever situated: McCulloch v. Price, 14 Mont. 320; 43 Am. St. Rep. 637; Loomis v. Griffin, 78 Iowa, 482; Nye v. Van Huse, 6 Mich. 328; 74 Am. Dec. 690; Deaver v. Savage, 3 Mo. 252; 25 Am. Dec. 437; nor a chattel mortgage of all the property or stock in trade of the mortgagor in a store or shop occupied by him in a place named: See monographic note to Barrett v. Fisch, 14 Am. St. Rep. 245;

nor a conveyance of all of the grantor's lots in a certain town: *Harmon v. James*, 7 Smedes & M. 111; 45 Am. Dec. 296; *Carson v. Ray*, 7 Jones, 609; 78 Am. Dec. 267, and note. But a deed of "all my interest in a piece of land adjoining the lands of" two parties named "and others" is void for uncertainty: *Harrell v. Butler*, 92 N. C. 20; and a grant of a piece of land situated in a named town wherein the grantor owns two pieces of land is also void for uncertainty where it fails to specify which piece is intended to be conveyed: *Lumbard v. Aldrich*, 8 N. H. 31; 28 Am. Dec. 381. The conclusion to be reached in the principal case depended upon the construction given to the word "estate" in the contract under consideration. If, as contended by the appellant, the language of the contract was so uncertain as to give no notice to subsequent incumbrancers that a lien was thereby charged upon certain property, such encumbrancers, if not otherwise chargeable with notice of the lien, would not be subject to it. The court construed "estate" as comprehending property susceptible of being impressed with a lien, which construction is supported, either directly or by analogy, by the few cases which may be cited with propriety in this connection. It is based upon the rule laid down by the cases already cited herein, that the word "estate" should be interpreted according to the context with a view to accomplish the intent of the parties as therein expressed. A charge of legacies upon all the testator's real estate does not form a lien upon lands specifically devised: *Worth v. Worth*, 95 N. C. 239. The North Carolina statute enabling a person to dispose of his "estate" by a nuncupative will, does not validate such a disposition of land, because the word is obviously not used in so broad a sense: *Smithdeal v. Smith*, 64 N. C. 52. A contract to devise "one-half of my estate" applies to such property as the contractor may have left subject to disposition by will or devise at his death: *Roehl v. Haumesser*, 114 Ind. 311. A will of the testator's "estate" does not embrace land of which at the time of his death, he was in possession without color of title: *Austin v. Rutland R. R. Co.*, 45 Vt. 215.

That an encumbrance may be fixed upon land by deed, is too well settled to require a citation of precedents. The same effect may be given an agreement, the recording of which will be notice to all persons afterward taking title to it: *Dexter's Appeal*, 81 Pa. St. 403; *Blevins v. Barker*, 75 N. C. 436; *Murrell v. Watson*, 1 Tenn. Ch. 342. Says Marshall, C. J., in *Archer v. Deneale*, 1 Pet. 585: "That the word 'estate' is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them, is a proposition which cannot be controverted." Where the declaration of a lien is in general terms failing to specify with definiteness the property to which the lien is intended to attach, a conflict of interests may arise between the lienholder and subsequent purchasers or encumbrancers. The sufficiency of such declaration as notice of the lien is thus brought in question. In *Green v. Witherspoon*, 37 La. Am. 751, it was held that a convey-

ance of "all other lands owned by the vendor in the state of Louisiana," though duly recorded, was inoperative as notice to the public of any particular tract conveyed, if not wholly void for want of description. Where a warehouse receipt provided that certain barrels of whiskey were to be delivered upon surrender of the receipt, after the payment of the government tax "and all other amounts due," it was held that the quoted words could only mean proper warehouse charges and gave no notice to an indorsee of the receipt that any lien existed in favor of a former owner for the purchase price of the whiskey: *State Bank v. Waterhouse*, 70 Conn. 76; post, p. 82. The principal case is supported by the holding of the supreme court of the United States in *Wilson v. Boyce*, 92 U. S. 820, affirming 2 Dill. 539. Under an act of the general assembly of the state of Missouri bonds were issued to, and accepted by, the Cairo & Fulton Railroad Company, which were by the same act constituted a first lien and mortgage upon the "road and property" of that company. The company having failed to pay the interest on the bonds, its lands were sold by the state, the defendant becoming the purchaser. Previous to this sale and subsequent to the receipt of the bonds, the company had executed a trust deed of a portion of its lands, under which deed the plaintiff claimed. The question was whether or not the word "property" in the statute created a valid lien upon these lands, and it was held that such was the effect and that the title of the plaintiff was destroyed by the foreclosure sale. Compare *Whitehead v. Vineyard*, 50 Mo. 80.

SPENCE v. SMITH.

[121 CALIFORNIA, 536.]

EXECUTION.—A STATUTE EXEMPTING THE FARMING UTENSILS and implements of husbandry of the judgment debtor, entitles him to retain as exempt a threshing outfit, necessary to enable him to carry on his farming operations, though he also uses it in threshing for others.

H. V. Beardon, for the appellant.

Richard Belcher, for the respondent.

53 HARRISON, J. The defendant, as sheriff of the county of Sutter, levied upon certain personal property under a writ of attachment, issued out of the superior court in an action therein against the plaintiff, and afterward sold the property under a writ of execution issued upon a judgment in said action. After the property had been seized by the defendant the plaintiff demanded the same from him, upon the ground that it was exempt from execution, and, upon the refusal of the defendant to

surrender it, brought the present action. The case was tried by the court without a jury, and judgment rendered in favor of the defendant. From this judgment the present appeal has been taken, and is presented here upon the judgment-roll alone without a bill of exceptions, and is urged upon the ground that the findings of fact do not support the judgment.

At the time the defendant seized the property described in the judgment he also took certain other property, consisting of farming utensils, which, upon the plaintiff's claim that they were exempt from seizure, he released and returned to him. The court finds that the property so released was sufficient in quantity ³³⁸ and kind to properly cultivate and farm more than two hundred acres of land. The court also finds that at the time the property was taken the plaintiff was engaged in farming about two thousand seven hundred acres of land, and that all of the property levied upon and seized by the defendant was necessary to enable him to properly carry on his said farming operations upon said two thousand seven hundred acres, and it also finds that, with the exception of the harnesses, collars, three headers, five header beds, the plows, stretchers, harrows, and blacksmith tools, all of the property involved herein were parts of a threshing outfit owned by plaintiff, and is of the value of four hundred and sixty dollars, and that the other property is of the value of one hundred and ninety dollars.

Whether any property shall be exempt from execution, as well as the character and amount of property to be exempted, is purely a question of legislative policy; and, when the legislature has determined that the farming utensils and implements of husbandry of a judgment debtor shall be exempt, a court is not authorized to refuse the exemption because, in its opinion, they are not necessary for the judgment debtor. The state has fixed no limit to the amount of land which a judgment debtor may cultivate by farming, and if the farming utensils which he has are necessary for the proper cultivation of his land, they are exempt from execution, irrespective of whether he would need them for cultivating a smaller tract. Section 690, subdivision 3, provides that: "The farming utensils or implements of husbandry of the judgment debtor" are exempt from execution. In *Estate of Klemp*, 119 Cal. 41, 63 Am. St. Rep. 69, it was held that this exemption included a combined harvester which was worth three hundred dollars. In that case it was said: "Horseshoes, gang plows, headers, threshing machines, and

ance of "all other lands owned by the vendor in the state of Louisiana," though duly recorded, was inoperative as notice to the public of any particular tract conveyed, if not wholly void for want of description. Where a warehouse receipt provided that certain barrels of whiskey were to be delivered upon surrender of the receipt, after the payment of the government tax "and all other amounts due," it was held that the quoted words could only mean proper warehouse charges and gave no notice to an indorsee of the receipt that any lien existed in favor of a former owner for the purchase price of the whiskey: *State Bank v. Waterhouse*, 70 Conn. 76; post, p. 82. The principal case is supported by the holding of the supreme court of the United States in *Wilson v. Boyce*, 92 U. S. 320, affirming 2 Dill. 539. Under an act of the general assembly of the state of Missouri bonds were issued to, and accepted by, the Cairo & Fulton Railroad Company, which were by the same act constituted a first lien and mortgage upon the "road and property" of that company. The company having failed to pay the interest on the bonds, its lands were sold by the state, the defendant becoming the purchaser. Previous to this sale and subsequent to the receipt of the bonds, the company had executed a trust deed of a portion of its lands, under which deed the plaintiff claimed. The question was whether or not the word "property" in the statute created a valid lien upon these lands, and it was held that such was the effect and that the title of the plaintiff was destroyed by the foreclosure sale. Compare *Whitehead v. Vineyard*, 50 Mo. 80.

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H. V. Reardon, for the appellant.

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surrender it, brought the present action. The case was tried by the court without a jury, and judgment rendered in favor of the defendant. From this judgment the present appeal has been taken, and is presented here upon the judgment-roll alone without a bill of exceptions, and is urged upon the ground that the findings of fact do not support the judgment.

At the time the defendant seized the property described in the judgment he also took certain other property, consisting of farming utensils, which, upon the plaintiff's claim that they were exempt from seizure, he released and returned to him. The court finds that the property so released was sufficient in quantity ³⁸⁸ and kind to properly cultivate and farm more than two hundred acres of land. The court also finds that at the time the property was taken the plaintiff was engaged in farming about two thousand seven hundred acres of land, and that all of the property levied upon and seized by the defendant was necessary to enable him to properly carry on his said farming operations upon said two thousand seven hundred acres, and it also finds that, with the exception of the harnesses, collars, three headers, five header beds, the plows, stretchers, harrows, and blacksmith tools, all of the property involved herein were parts of a threshing outfit owned by plaintiff, and is of the value of four hundred and sixty dollars, and that the other property is of the value of one hundred and ninety dollars.

Whether any property shall be exempt from execution, as well as the character and amount of property to be exempted, is purely a question of legislative policy; and, when the legislature has determined that the farming utensils and implements of husbandry of a judgment debtor shall be exempt, a court is not authorized to refuse the exemption because, in its opinion, they are not necessary for the judgment debtor. The state has fixed no limit to the amount of land which a judgment debtor may cultivate by farming, and if the farming utensils which he has are necessary for the proper cultivation of his land, they are exempt from execution, irrespective of whether he would need them for cultivating a smaller tract. Section 690, subdivision 3, provides that: "The farming utensils or implements of husbandry of the judgment debtor" are exempt from execution. In *Estate of Klemp*, 119 Cal. 41, 63 Am. St. Rep. 69, it was held that this exemption included a combined harvester which was worth three hundred dollars. In that case it was said: "Horserakes, gang plows, headers, threshing machines, and

combined harvesters are as clearly implements of husbandry as are handrakes, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing. There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former implement used with less effectiveness for the same purpose;" and as the legislature had not placed any limitation upon the character of the implements of husbandry, or their value, courts have no right to exclude them from the operation of the statute.

⁵⁸⁰ The threshing outfit did not cease to be exempt from execution by reason of the fact that it was usually the custom for the plaintiff to use it for hire to thresh the crops of others after doing his own threshing. At the time the property was seized it was in use by the plaintiff, and the court finds that all of it was necessary for his use in farming his land. In Baldwin's case, 71 Cal. 74, it was held that the legislature meant by the foregoing exemption such utensils or implements as are needed and used by the farmer in conducting his own farming operations; and in Stanton v. French, 91 Cal. 277, 25 Am. St. Rep. 174, it was held that the debtor is not required to use the exempt property exclusively in his customary vocation. It would be a hard rule upon the debtor to hold that, although the property was necessary for properly carrying on his farming, he would forfeit the exemption should he seek to earn something with it after he had ceased to need it for his own farming. A better suggestion would be that, if, in the opinion of the creditor, he is cultivating more land than he needs, he could satisfy his debt by levying his execution upon the land itself.

The judgment is reversed and a new trial ordered.

Van Fleet, J., and Garoutte, J. concurred.

EXECUTIONS—EXEMPTIONS—FARMING UTENSILS.—In the exemption of tools or implements of a debtor's occupation, the distinction between simple instruments and machines of a complicated nature has often been noted in excluding the latter from the benefits of the exemption laws. Thus a threshing machine was held not a "proper tool or implement of a farmer," under a statute limiting the value of exempted articles, beyond which the thresher did not go: See monographic note to Kilburn v. Demming, 21 Am. Dec. 552. It has been previously held in California that under the statute construed in the principal case, the value of the property claimed as exempt is not material, and that under it a judgment debtor may hold as exempt a combined harvester costing fifteen hundred dollars, though comparatively few farmers own such a harvester: Estate of Klemp, 119 Cal. 41; 63 Am. St. Rep. 69, and note.

KERRY v. PACIFIC MARINE COMPANY.

[121 CALIFORNIA, 561.]

SHIPPING—CARRIERS' IMPLIED OBLIGATION TO DELIVER IN GOOD CONDITION.—Where a carrier having complete control of a vessel agrees to receive a cargo in one place and to transport it to, and deliver it at, another, there is an obligation implied that the loading and unloading of the cargo shall be so conducted by the carrier that no unnecessary injury shall be done thereto.

SHIPPING—CHARTER PARTY—WHO IS OWNER FOR THE VOYAGE SO AS TO BE LIABLE FOR BREACHES OF DUTY.—A charter party stipulating that one of the parties thereto will furnish a vessel and keep it in good condition during a voyage, that it will receive a specific cargo and deliver it at the port of destination, that the whole of the vessel except certain parts for the use of the crew shall be at the sole use of the other party, who shall pay certain specified rates, does not make the owner or shipper of the cargo the owner of the voyage. On the contrary, the party furnishing the vessel is such owner, and, as such, liable for any breach of duty respecting the care, loading, and unloading of the cargo.

SHIPPING.—ONE PURPORTING TO ENTER INTO A CHARTER PARTY AS MANAGING OWNER OF A VESSEL, and who in fact owns nine-sixteenths thereof, is personally liable under such charter party for any breach thereof or of its implied obligations, where it does not disclose the name of any principal for whom such managing owner acts as agent.

SHIPPING—PART OWNERS—LIABILITY OF.—If an action is brought against a part owner upon a contract relating to a ship, and he does not, by proper plea, object that the other owners are not joined with him, the plaintiff may recover his whole demand of such joint owner, who, on his part, may afterward pursue the others for contribution.

SHIPPING.—The act of Congress, limiting the liability of part owners of vessels, does not prohibit their contracting so as to be answerable for the entire damage which may result from a breach of the contract. If any of them does so contract, such act of Congress does not relieve him.

DAMAGES—PLEADING—GENERAL ALLEGATION CONTROLLED BY SPECIFIC AVERMENTS.—If a complaint seeking to recover damages for an injury to piles states that the plaintiff was obliged to sell such piles at nine and one-half cents per foot, whereas they would have been worth fourteen cents per foot but for the wrongs complained of, and contains a general averment that by the acts complained of the plaintiff was damaged in the sum of three thousand dollars, the special averment controls, and plaintiff cannot recover any sum in excess of four and a half cents for each foot of such piles.

APPELLATE PRACTICE—MODIFYING JUDGMENT INSTEAD OF DIRECTING A NEW TRIAL.—If, in an action to recover damages the trial court enters judgment for a sum greater than warranted by the allegations of the complaint, but the findings necessarily show such allegations are true, the judgment may be modified in the appellate court by striking off the excess and affirming as to the residue.

Naphtaly, Freidenrich & Ackerman, for the appellant.

W. H. Fowler and D. H. Whittemore, for the respondent.

565 THE COURT. Action on a charter-party by which defendant undertook to carry for plaintiff, in the bark "Templar," a cargo of piles from Seattle to San Francisco. Damages are claimed as resulting from the careless and negligent handling of the piles while being loaded and unloaded, whereby the bark on them became peeled off, thus diminishing their value. Plaintiff had judgment for two thousand three hundred and ninety dollars, from which and from the order denying a new trial defendant appeals. The pleadings are verified.

The complaint alleges that defendant is a corporation, and **566** "as managing owner of the bark 'Templar' of San Francisco entered into a contract of charter-party with plaintiff, whereby it was covenanted and agreed that the said bark 'Templar' should be chartered, et cetera. . . . That defendant agreed to keep said vessel during said voyage tight, staunch, and well fitted; that she was to receive the said piles and short storage as aforesaid, carry the same and deliver them at the port of San Francisco in good marketable condition and in as good order and condition as they received the same," et cetera. The charter-party purports to be "between the Pacific Marine Supply Company of San Francisco, California, party of the first part, managing owner of the bark 'Templar' of San Francisco, and A. S. Kerry, of Seattle, Washington, of the second part." By the terms of the charter-party the first party agreed "on the freighting and chartering of the said vessel unto the said party of the second part from a voyage from the port of Seattle, Washington, to San Francisco, California, on the terms following": (1) That the vessel should be kept tight and staunch, et cetera, and well supplied with men and provisions; (2) that all the vessel, except certain portions for the use of the crew, should be at the sole use of plaintiff; and defendant agreed (3) to take and receive on board the same vessel during the voyage;" then follow the agreements entered into by plaintiff as to cargo to be furnished, the size of piles at the butt; rate of payment per lineal foot, regulations as to discharging cargo, et cetera. The contract is signed as follows: "Pacific Marine Supply Company, Alfred Greenebaum, Manager, D. M. Kennedy, Agent for A. S. Kerry."

1. It is contended by defendant that the action is based up-

on the breach of the written contract, which nowhere in terms provides that defendant agreed to deliver the piles in good order and condition as received, and unless there was such implied promise plaintiff cannot recover; that allegations and proofs must agree, and the proofs must disclose the cause of action which is alleged in the complaint (citing *Barrere v. Sompas*, 113 Cal. 97); and it is claimed that there is a total failure of proofs upon this point. The contract does not provide in terms for the safe delivery of the cargo; but the court found that "defendant agreed that the said vessel should receive the said piles, ⁵⁶⁷ and carry the same and deliver them at the port of San Francisco in good marketable condition and in as good condition as it received the same." The court also found that the piles when received were in good and marketable condition. These findings are challenged as not supported by the evidence. The court also found that the "defendant was the owner of nine-sixteenths of said vessel and was the manager thereof; that as such owner, and as agent of the owners of the other seven-sixteenths, said defendant made said charter."

It appears in evidence that a receipt for the cargo was signed by John Lee, master (who was also a part owner), which reads: "Seattle, Wash., August 29, 1893. Received from A. S. Kerry, on board the bark 'Templar,' the following packages, contents unknown, to be delivered at San Francisco, Cal., . . . and with privilege of reshipping on steamboats or barges." Then follows description of cargo.

Defendant by the contract itself let not only the vessel in proper condition "and provided with every requisite" for the service, but it also agreed to furnish "men and provisions necessary for the voyage," and defendant engaged "to take and receive on board the same vessel during the aforesaid voyage," the entire vessel (except cabin, deck, and room for the crew and stowage for sails, cables, and provisions) "to be at the sole use and disposal of plaintiff. The compensation was fixed by a rate to be charged per lineal foot of the piles and a certain rate for other lumber. Lay days were provided for in loading and unloading, beyond which plaintiff was to pay forty dollars per day for detention. Defendant agreed to receive cargo "delivered alongside of the vessel within reach of her tackles," and the charter was to commence "when the vessel is ready to receive cargo at her place of loading and notice thereof is given," and not at San Francisco where she was when chartered. The receipt given shows that the cargo was received on board ship by

the master, "to be delivered at San Francisco." The evidence showed that the loading and unloading was done by the crew of the vessel, under the direction of the master, who had entire charge and command of the ship. It is evident, we think, that the entire control and management of the vessel and the loading and unloading of the cargo were in the hands ⁵⁶⁸ of defendant. Plaintiff was to pay freight at fixed rates on the cargo when delivered. In such contract as this, there is, we think, an implied obligation that in loading and unloading cargo it shall be so done as not to cause unnecessary injury to the merchandise; and for injury resulting from the negligence of the carrier there is an implied liability: Civ. Code, sec. 2114. It was not necessary, therefore, for plaintiff to prove an express stipulation in the written contract that the freight was to be delivered in good condition.

The question, who is to be considered as owner for the voyage in cases of charter-party, so as to create a liability for repairs or breaches of duty, has been often litigated in England and America. The principles upon which the cases rest will be found discussed in Abbott on Shipping, part 1, chapter 1, section 8. In a question of construction it is not possible to lay down any rule of universal application, but Mr. Abbott says: "It seems to result from the cases decided upon this subject that when, by the terms of the charter-party, the master and mariners are to continue subject to the orders of the shipowner, he retaining through them the possession, management, and control of the vessel, it is to be considered a contract to carry the freighter's goods, but where the merchant engages to pay a stipulated price to the shipowner for the use of his ship, for the voyage, by the month or year—takes it and them into his service—receiving the freight actually earned by it to his own use, the master and mariners becoming subject to his orders, and the general management and control of them and the vessel being given up to him, it is a demise of the vessel with her crew for the voyage, or the term specified; the charterer becomes owner pro hac vice, entitled to the rights and subject to the responsibilities which attach to the character." In the case of *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 39, it was said: "Where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." It cer-

tainly would not be for one moment contended in the case at bar that the plaintiff would have been liable, under the charter-party ⁵⁶⁹ here for damages resulting from collision through the negligence of the master or crew in navigating the chartered vessel. We are unable to see in the contract entered into, as understood and acted upon by all the parties, any element of ownership pro hac vice in plaintiff; nor can we see in it such demise of the vessel and crew as would subject the plaintiff to the responsibilities which attach to the character of owner pro tempore.

But it is contended that the action is against defendant as managing owner of the vessel, and that there is an entire failure of proof that it was such owner. As we understand defendant's contention, it is that defendant was the manager of the vessel, and as such was the general agent for the owners, and incurred no other liability than to provide for the ship's seaworthiness, to take care of her in port, to see that she was provided with necessary papers, with proper master, mate, crew, and supplies of provisions, and that this relation and this limited liability were not changed by the fact that defendant was part owner or managing owner.

Section 2071 of the Civil Code makes it "the duty of the manager of a ship, unless otherwise directed," to provide for the ship's seaworthiness, et cetera, as claimed by defendant, but this section does not attempt to define the full extent of the duties and liabilities of the manager, who is also part owner, and who, by section 2070 of the Civil Code, is called "the managing owner." Without attempting to define the meaning of this section of the Civil Code in respect of any difference between the powers and duties of a "manager" and a "managing owner," when they act as "general agent for the owners," it seems to us quite clear that when either the manager or managing owner assumes to act as agent he should disclose his agency in some unmistakable manner, if he desires to escape liability as principal.

The charter-party was signed by defendant in its corporate capacity, describing itself in the body of the instrument as managing owner, and the evidence was that it owned nine-sixteenths of the vessel and the master two-sixteenths; but plaintiff did not know when he signed the charter-party who were the owners. Defendant admitted in its answer that it made the contract as managing owner, but denied that it "had any ⁵⁷⁰ other connection with said vessel than as managing owner

thereof and agent for the owners." Neither in the body of the instrument nor in the signature of defendant does defendant appear or assume to act as agent; and defendant offered no evidence that it was agent, or acting as agent. The customhouse certificate of registration shows other part ownership, but that alone affords no sufficient evidence that defendant did not intend to be bound as principal, for, having possession and control of the vessel, and having employed her master, the plaintiff might well assume that defendant was contracting for itself in respect of the vessel. The most that can be claimed under section 2070, of the Civil Code, for defendant as managing owner, is that the contract indicated that defendant was negotiating for third parties, as well as for itself as part owner; but defendant did not disclose the identity of these other parties, nor their interest in the ship nor did it attempt to bind anyone but itself.

It was stated by Mr. Story that "when, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held personally bound, although he is known to be or avowedly acts as agent": Story on Promissory Notes, sec. 68. And is only where the true object and intent to bind the principal, and not the agent, can be collected upon the whole instrument that courts of justice will adopt that construction: Story on Promissory Notes, sec. 69.

It was said in *Murphy v. Helmrich*, 66 Cal. 71: "Where an agent does not attempt, in an instrument, to bind his principal, and in terms imposes the obligation on himself, the rule is, that he incurs by such act a personal liability, even though he described himself as an agent": See, also, *Hobson v. Hassett*, 76 Cal. 203; 9 Am. St. Rep. 193.

2. The court found that defendant "was the owner of nine-sixteenths of said vessel, and was the manager thereof; that as such owner and as agent of the owners of the other seven-sixteenths said defendant made said charter."

Appellant claims that this finding is outside the issues in the case, and that defendant cannot be made liable in this case as part owner. Defendant was sued as liable under the contract because it signed the contract in its individual and corporate ⁵⁷¹ capacity. It was, perhaps, unnecessary to inquire into the ownership of the vessel. But the finding that defendant was part owner was not prejudicial to defendant, for it is liable under this contract when regarded as part owner and acting as agent for the other owners, even though the other part owners

may also be liable. Mr. Story in his work on Agency, section 278, says: "Nothing is more common than for a contract to be made by which the agent is personally bound, and which yet is, *ex consequenti*, binding on the principal also, although the latter is not a direct and immediate party to the instrument. . . . The more correct and satisfactory doctrine would seem to be that where the agent is a direct party of the instrument and the principal is not, so that the latter is not, *ex directo*, suable thereon, there the agent, although he describes himself as agent, is suable upon the covenants and agreements contained therein as his own personal contract." And the doctrine is extended to the master contracting within the ordinary scope of his powers and duties; and the rule "is said to have been introduced in favor of commerce, so that merchants may not be compelled to seek after the owners to sue them, but that they may have a twofold remedy against the owners and against the master": Story on Agency, sec. 294.

Mr. Abbott says: "If an action is to be brought against the part owner upon a contract relating to the ship, although regularly such action should be brought against all jointly, yet, if all are not sued the defendants can only avail themselves of the objection by a plea in abatement; and if they omit to plead such a plea the plaintiff will recover his whole demand, and the defendants must afterward call upon the others for contribution": Abbott on Shipping, pt. 1, c. 3, sec. 7. p. *116; Code of Civ. Proc., secs. 433, 434.

3. It is claimed that defendant's liability is limited by section 18 of the act of Congress of June 26, 1884, to nine-sixteenths of plaintiff's damage: Supplement to Rev. Stats. 1874-91, p. 443. This section provides: "That the individual liability of a shipowner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears to the whole." Respondent claims that this act does not apply, and that if it does defendant has not taken the required ⁵⁷² steps to limit its liability, and furthermore, that defendant cannot have relief in this action and this forum, but must resort to a court of admiralty jurisdiction.

There is nothing in the act of Congress prohibiting part owners to so contract as to become liable for the entire damage, whatever it may be; and, as we think defendant made such contract in this case, the act of Congress is not available to defendant to limit its liability, and need not be considered.

In Carver's case, 35 Fed. Rep. 665, it was held that the act of

1884 "does not restrict the liability of the owners upon their own personal contracts, but only their liability 'on account of the vessel'; that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz., for the contract or acts of the ship or her master without the owner's express intervention": *Gokey v. Fort*, 44 Fed. Rep. 364.

4. Appellant contends that the evidence is insufficient to show that the piles were barked through defendant's fault or carelessness in loading or unloading. There was much evidence tending to show that the damage to the piles was the direct result of their being handled in a careless and negligent manner. Other evidence tending to show that the piles were in bad condition when delivered to the vessel, and had been previously injured. The evidence was conflicting upon the point, and we cannot, under the settled rule, pass upon its relative weight.

5. The court found that plaintiff delivered to the vessel forty-seven thousand eight hundred lineal feet of piles, which were delivered in San Francisco and were worth when received at the vessel fourteen cents per lineal foot, but were worth only nine cents per lineal foot as delivered at San Francisco, and plaintiff was compelled to sell at that price. The damage found was this difference in value. It is claimed that because the complaint alleged that plaintiff was obliged to dispose of the piles at nine and one-half cents per lineal foot, the finding by the court is in excess of the amount of damage claimed by plaintiff in his pleadings. In his verified complaint plaintiff alleged: "That owing to the careless and negligent manner in which defendant handled the said cargo the said plaintiff was obliged to dispose of the said piles at the rate of nine and one-half cents per lineal foot"; again, that the piles were worth fourteen cents per lineal ⁵⁷³ foot in San Francisco if they had been delivered as received, "but that nine and one-half cents was all that plaintiff could procure for them in San Francisco, and all that they were worth in the condition in which they were delivered," et cetera.

There is a general averment of damages to the effect that by reason of the careless and negligent manner in which the defendant handled the piles plaintiff was damaged in the sum of three thousand dollars. From these allegations it appears that plaintiff not only has alleged that his direct loss by reason of the injury to the piles was the difference between fourteen cents per foot and nine and one-half cents, but, additionally, he has alleged the fact that he sold them for nine and one-half cents. This being so, his damages from this cause could not have ex-

ceeded four and one-half cents per foot. He is allowed damages, however, at the rate of five cents per foot. It is said that the evidence supports this finding. However that may be, the finding is at variance with the allegation of the complaint. It is fundamental that in such an action a man may not recover in damages an amount greater than that which he pleads will compensate him for his injuries. The finding is not saved by the general *ab damnum* clause above referred to. That averment is not inconsistent with the idea that the direct damage was the difference between nine and one-half cents and fourteen cents, and that other consequential damages for which defendants are responsible raised the amount to three thousand dollars. It is quite apparent that plaintiff has been allowed for the injury to the piles a sum for damages one-tenth greater than that for which he asks in his complaint.

The finding of damage is for an amount greater than the complaint avers. Still, the finding necessarily establishes that plaintiff was damaged to the amount which he claims. The judgment may, therefore, be modified, and it will still be supported by the finding in question. All other propositions having been resolved in favor of plaintiff and respondent, it would be a hardship to compel a new trial if that result could properly be avoided. We think this may be done for the reasons indicated, which reasons find support in many cases: *Fischer v. Blank*, 138 N. Y. 669; *Cox v. Burlington etc. Ry. Co.*, 77 Iowa, 478; *Miller v. Wilkins*, 79 Ga. 675; *Frankhouser v. Cannon*, 50 Kan. 621; *Winter v. Fulstone*, 20 Nev. 260.

574 The judgment of reversal is vacated. The court below is directed to modify its judgment by reducing the same in the sum of two hundred and thirty-nine dollars or one-half of one cent per lineal foot for all of the piles. It is further ordered that appellant have his costs upon this appeal.

Hearing in Bank denied.

SHIPPING—CHARTER PARTY—CONSTRUCTION.—When it is doubtful on the face of a charter party whether or not it was intended to clothe the charterer with ownership in the ship, the presumption is against such intention. As between the two possible constructions, the law inclines to a contract of affreightment rather than a contract of ownership or lease of the ship: *Swift v. Tatner*, 89 Ga. 660; 32 Am. St. Rep. 101. See *Pitkin v. Brainerd*, 5 Conn. 451; 13 Am. Dec. 79, and extended note.

SHIPPING—JOINT OWNERS—RIGHTS AND LIABILITIES.—Owners of a majority of the interest in a vessel have a right to control her, and to direct the manner of her employment: *Gray v. Allen*, 14 Ohio, 58; 45 Am. Dec. 523. The owner of a two-thirds interest in a boat has the right to continue her in her usual em-

ployment, and is not liable to the other part owners for any loss sustained by reason of such employment: *Thoms v. Southard*, 2 Dana, 475; 26 Am. Dec. 467. An agreement with some of the owners of a vessel that freight shall be carried thereon for a compensation which is to redound to the sole benefit of those owners with whom the agreement is made, will not bind the owners who were not parties thereto to any liability for the loss of the freight that may be shipped thereunder: *Jones v. Sims*, 9 Port. 236; 33 Am. Dec. 313. See *Swift v. Tatner*, 89 Ga. 660; 32 Am. St. Rep. 101; monographic note to *Donnell v. Walsh*, 88 Am. Dec. 364-368, on the law of part owners of vessels.

APPEAL—MODIFYING JUDGMENT FOR EXCESSIVE DAMAGES.—An excessive verdict is cured by entering a remittitur in the appellate court for a smaller sum: *Smith v. Wabash etc. Ry. Co.*, 92 Mo. 359; 1 Am. St. Rep. 729; *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80.

NORMAN v. NORMAN.

[121 CALIFORNIA, 620.]

MARRIAGE ON THE HIGH SEAS—WHEN VOID.—A marriage on the high seas must be judged by the law of the state of the domicile of the parties, and if not supported thereby is void. There is no law in force on the high seas, unless it be that of the domicile of the parties, controlling or authorizing marriage.

FOR A VALID MARRIAGE the laws of California require a solemnization in the mode and by the persons specified in its Civil Code.

Walter F. Haas and A. M. Stephens, for the appellant.

Davis & Rush, for the respondent.

622 **CHIPMAN, C.** Action to have a certain marriage between plaintiff and defendant declared valid and binding upon the parties. A second amended complaint alleged that on August 2, 1897, defendant was a minor of the age of fifteen years and ten months, and that her father, one A. C. Thomson, was her natural and only guardian; plaintiff was of the age of twenty-one years and ten months, and that both plaintiff and defendant were citizens and residents of Los Angeles county, California; on said day plaintiff and defendant, at Long Beach, on the coast of California, boarded a certain fishing and pleasure schooner of seventeen tons burden, called the "J. Willey," duly licensed under the laws of the United States, of which W. L. Pierson was captain, and was enrolled as master thereof, and had full charge of said vessel; said vessel proceeded to a point on the high seas about nine miles from the nearest point from the boundary of the state and of the United States; the parties then and there agreed, in the presence of said Pierson, to

become husband and wife, and the said Pierson performed the ceremony of marriage, and among other things they promised in his presence to take each other for husband and wife, and he pronounced them husband and wife; neither party had the consent of the father or mother or guardian of defendant to said marriage; on the same day and immediately after said ceremony the parties returned to the county of Los Angeles, and have ever since resided there, and they then and there immediately ~~and~~ began to live and cohabit together as such husband and wife, and continued so to do until the tenth day of August, 1897. said marriage has never been dissolved; defendant denies the validity of said marriage and refuses to join in a declaration thereof.

Defendant, by her guardian ad litem, admits the allegations of the complaint, and alleges that in having the ceremony performed as alleged plaintiff and defendant did so with the intent and for the purpose of evading the statutes of the state prescribing the manner in which marriages shall be contracted and solemnized. She prays that the said pretended marriage be declared illegal and void, and that plaintiff be precluded and estopped from ever setting up or asserting or claiming to be the husband of defendant. The court found all the allegations of the complaint and answer to be true, and as conclusion of law found that plaintiff was not entitled to the relief claimed, but that the said pretended marriage was illegal and void, and judgment was entered accordingly.

The appeal is from the judgment. The action is brought under section 78 of the Civil Code. It must be conceded that the question presented by this appeal is one of much importance, whether viewed in its relation to society or to the parties only.

Appellant contends: 1. That the marriage is valid because performed upon the high seas; and 2. That it would have been valid if performed within this state, because there is no law expressly declaring it to be void. Respondent presents the case upon two propositions, claiming: 1. That no valid marriage can be contracted in this state except in compliance with the prescribed forms of the laws of this state; and 2. That citizens and domiciled residents cannot go upon the high seas for the avowed purpose of evading the law of this state, and contract a valid marriage.

Sections 722, 4082, and 4290 of the Revised Statutes of the United States are cited by appellant as recognizing marriages

at sea and before foreign consuls, and that section 722 declares the common law as to marriage to be in force on the high seas on board American vessels. We have carefully examined the statutes referred to and do not find that they give the slightest support to appellant's claim.

⁶²⁴ The law of the sea, as it may relate to the marriage of citizens of the United States domiciled in California, cannot be referred to the common law of England any more than it can to the law of France or Spain or any other foreign country. We can find no law of Congress, and none has been pointed out by appellant, in which the general government has undertaken or assumed to legislate generally upon the subject of marriage on the sea. Nor, indeed, can we find in the grant of powers to the general government by the several states, as expressed in the national constitution, any provision by which Congress is empowered to declare what shall constitute a valid marriage between citizens of the several states upon the sea, either within or without the conventional three mile limit of the shore of any state; and clearly does no such power rest in Congress to regulate marriages on land except in the District of Columbia and the territories of the United States, or where it possesses the power of exclusive jurisdiction. We must look elsewhere than to the acts of Congress for the law governing the case in hand. Section 63 of the Civil Code provides as follows: "All marriages without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." The parties in the present case were residents of and domiciled in this state and went upon the high seas to be married with the avowed purpose of evading our laws relating to marriage. It seems to be well settled that the motive in the minds of the parties will not change the operation of the rule. Chief Justice Gray, in *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, said: "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here." This has been repeatedly affirmed by well-considered decisions. The authorities are found fully reviewed in that case, as they also will be found in support of the general rule in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, by the same learned

jurist: See, also, as to marriages in evasion of the law of the ⁶²⁵ domicile of the parties, Bishop on Marriage and Divorce, sec. 880, et seq. If the marriage in question can find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed, we should feel constrained by our code rule and well-considered decisions to declare it valid here, even though the parties were here domiciled at the time and went to the place where they attempted to be married for the purpose of evading our laws which they believed forbade the banns. But the parties did not go to any other state or country to be married. They went upon the high seas where no written law, of which we have any knowledge, existed by which marriage could be solemnized. The rule, therefore, that the law of the place must govern does not operate, because there was no law of the place unless we may hold that the law of the domicile applies. The question presented is *res integra* so far as we have been able to discover; and no case in England or the United States or elsewhere has been found by counsel (and their briefs disclose much research and industry) holding that the code rule *supra* applies to such a marriage as this. In the case of *Holmes v. Holmes*, 1 Abb. (U. S.) 525, the question was whether a marriage had been contracted under the laws of California or Oregon. It seems that the parties, who were domiciled in Oregon, met in San Francisco and there took passage on the steamer for Portland. It was at the trial suggested that the marriage might have taken place on board this vessel when on the high seas. There was no evidence that the parties ever met elsewhere, except in California and Oregon. In the opinion by Deady, J., it was said, after showing that there was no valid marriage under the laws of either of these states: "Nor do I think that citizens of this state [Oregon], as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another state—as at sea—and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought not to be held valid by them." It is said by appellant that this expression of opinion is but dictum, inasmuch as the question did not necessarily arise. This may be true, but it commends ⁶²⁶ itself to our judgment as wise and sound upon reason and principle. We find no case holding that parties domiciled in a state may, for the avowed purpose of evading its laws, go where

no law exists and there consummate marriage in violation of the laws of their domicile, and immediately return and claim a valid marriage. In all the cases where the statutes have been thus circumvented it was accomplished by a marriage valid in the place where celebrated. The Gretna Green marriages of Scotland between citizens of England are notable examples, and they were upheld by the ecclesiastical courts. But these marriages were solemnized in accordance with the laws of Scotland, and therefore had legal sanction; and so also marriages in this country of citizens of one state going into another to avoid some disqualification prescribed in the law of their domicile.

It has been properly held that, as marriage is a natural right of which no government will allow its subjects, wherever abiding, to be deprived, if the parties happen to be sojourning in a foreign country, and under the local law there is no way by which they can enter into valid marriage, they may marry in their own forms and it will be recognized at home as good: Bishop on Marriage and Divorce, sec. 890, et seq. But this author says: "In reason, for we have probably no adjudications of the question, a marriage void by the law of the place of its celebration, in a case where such law provides no valid method, would not be made good by the rule we are considering if the parties went there simply to avoid compliance with the law of their domicile. There was no necessity; for their own law was open to them at home, and it would not assist them in eluding its inhibitions." And he refers to the case of *Holmes v. Holmes*, 1 Abb. (U. S.) 525, remarking: "It would, perhaps, be the same also where the resort was, for the like purpose, to an uninhabited region of the high seas." In the case before us, the parties not only went where there was no law authorizing the marriage, but they went with the intention of immediately returning to their domicile where they supposed the law would not admit of their marriage, to enjoy the fruits of their contract. There was no necessity upon the parties to do this suddenly arising, or arising from unexpected surrounding circumstances, but the circumstances were of their own creation and for a purpose ⁶²⁷ to evade the law of their home. There is, we conceive, no ground of expediency, sound policy, or good morals upon which the transaction can be given legal sanction. In summing up the doctrine Mr. Bishop says (Bishop on Marriage and Divorce, sec. 920): "Therefore the rule necessarily is, that whenever a marriage is entered into, so that the laws of one country take cognizance of it, it will be accepted in every other

country also; on the other hand, no forms matrimonial which come short of constituting valid marriage in the one country will so bring it within the cognizance of international law as to make it valid elsewhere." We think it results from considerations of reason and principle that unless it appears that this marriage was consummated under some recognized law the courts of this state should not declare it valid; and we think the burden is upon appellant to show such a law, failing in which his suit must fail. The authorities are many to the point that the party who relies upon the foreign law, or law of another state, must prove the law by its production: *Stewart's Marriage and Divorce*, sec. 119, cases cited.

Respondent cites the case of *Crapo v. Kelly*, 16 Wall. 610, where it was held that, in the case of an assignment in insolvency in the state of Massachusetts, it carried with it a vessel then in the Pacific Ocean; and in an elaborate opinion it was shown that, except for the purposes and to the extent that certain attributes have been transferred to the United States by the several states of the Union, each possesses all the rights and powers of a sovereign state, and that the vessel in question was a part of the territory of the state of Massachusetts, although at the time in the Pacific Ocean, and that the laws of Massachusetts would govern the assignment. It is hence argued by respondent that the law of the domicile in the present case should govern. There is much force in this position, but we do not deem it necessary to place our decision on that ground. We think the law of the domicile of the parties must be the law by which to judge the validity or invalidity of this marriage upon the grounds already stated.

We are thus brought to the only remaining question: Was the marriage valid tested by the laws of California?

If this marriage can be upheld, it must be upon the sole ground that there was mutual consent, solemnization by a sea captain, and subsequent cohabitation as husband and wife for the space of eight days. What constituted marriage in this state, prior to the amendments of the code in 1895 and 1897, has been pretty well settled and need not be restated here. In the light of the history of past litigation, it ought not to be difficult to determine what is a valid marriage under existing law. Section 55 of the Civil Code, as amended in 1895, provided as follows: "Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute

marriage; it must be followed by a solemnization authorized by this code." No particular form of solemnization is required, "but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife": Civ. Code, sec. 71.

Section 70 of the Civil Code provides as follows: "Marriage may be solemnized by either a justice of the supreme court, judge of the superior court, justice of the peace, priest, or minister of the gospel of any denomination." Prior to the amendment of 1895 the consent to marriage was required to be followed either by "a solemnization, *or by a mutual assumption of marital rights, duties, or obligations*": Civ. Code, sec. 55. The amendment added the words "authorized by this code" after the word "solemnization" and struck out the words above in italics.

It seems to me that the intention of the legislature is plainly declared that consent must be followed by such solemnization as is authorized by the code or there can be no valid marriage; and that this solemnization can only be performed by the persons mentioned in section 70, of the Civil Code, for no other persons are so authorized. Prior to 1895 section 75 of the Civil Code provided for marriages by declaration without the solemnization required by section 70, but the act of March 26, 1895, swept away that easy process of marriage. Section 68 of the Civil Code was also amended in 1895 in an important particular. It now reads: "Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article; but noncompliance with its provisions *by other than the parties to a marriage* does not invalidate that marriage." The words in italics were added to the section as it formerly stood, and would seem to imply that, ⁶²⁹ while there may be noncompliance with the law by parties other than those seeking marriage, there cannot be by the latter. Section 76 of the Civil Code now, as heretofore, makes provision for supplying the evidence of marriage where no record of the solemnization is known to exist; and a form of written declaration is prescribed. A new section, 79½, was added to the Civil Code in 1897, which provides that "the provisions of this chapter, so far as they relate to procuring licenses and the solemnizing of marriage, are not applicable to members of any particular religious denomination having, as such, any peculiar mode of entering the marriage relation; but such marriages shall be declared as provided in section 76 of the Civil Code of this state, and shall be acknowledged and recorded as provided in section 77 of said Civil Code." Section

69 of the Civil Code provides that: "All persons about to be joined in marriage must first obtain a license therefor from the county clerk of the county in which the marriage is to be celebrated, showing." . . . Then follow certain facts which must appear, such as names, identity, and ages of the parties, et cetera. When a marriage may not be invalidated although there has been noncompliance with the provisions of article 2, sections 68-79½, "by other than the parties to the marriage" need not now be determined. In this case there was no license, there was no solemnization by any person authorized by law to perform the ceremony, there was no marriage under section 79½. To recognize such a marriage we think would grossly violate the spirit and letter of our statute and be a blot upon the civilization we profess. To give the law any just interpretation we must hold that, subject to the exception mentioned in section 79½, section 55 requires not only the consent of parties capable of making a contract of marriage, but that that consent must be followed by a solemnization authorized by the code, and this solemnization can only be performed by the persons named in section 70. We do not think it necessary to decide whether it is mandatory to obtain a license; nor whether the minority of the defendant and want of consent of her parents or guardian would invalidate the marriage. Our conclusion rests upon the want of any authorized solemnization and would be the same if the parties were both of full age. We recommend that the judgment be affirmed.

680 Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

MARRIAGES AT SEA—VALIDITY OF.—In a recent note in this series the question involved in the principal case was adverted to and the conclusion reached that with respect to marriage upon the high seas it is probable that it can be contracted only under the same circumstances and in the same form in which the parties could contract it in the state of their domicile, and hence, that the delusion that parties who for some reason cannot contract a marriage in the state of their domicile, may contract such a marriage by going upon the high seas, has nothing to sustain it in the decisions of the courts: See monographic note to *State v. Shattuck*. 60 Am. St. Rep. 947.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

STATE BANK v. WATERHOUSE.

[70 CONNECTICUT, 76.]

WAREHOUSE RECEIPTS.—THE INDORSEMENT AND DELIVERY of a warehouse receipt transfers the legal title and the constructive possession of the property to the indorsee, and the warehouseman thereafter becomes his bailee and holds the property for him.

WAREHOUSE RECEIPTS—INDORSEMENT OF—NOTICE OF LIENS.—An agreement between an original owner of goods and a warehouseman that the goods shall remain in the warehouse until the purchase price thereof has been paid and the revenue tax repaid, does not affect a subsequent bona fide indorsee of the warehouse receipt without notice.

WAREHOUSE RECEIPTS—INDORSEMENT OF—NOTICE OF LIENS.—If a warehouse receipt provides that certain whiskey is to be delivered upon surrender of the receipt, payment of revenue tax, "and all other amounts due," the words quoted cover only proper warehouse charges, and are not notice to a subsequent indorsee of the receipt that a lien exists in favor of the original owner for the purchase price of the whiskey.

WAREHOUSE RECEIPTS—INDORSEMENTS OF—NOTICE OF LIENS—ESTOPPEL.—If a warehouseman has paid the revenue tax upon whiskey in store, and, issued his receipt therefor reciting that such tax has been paid, he is estopped, as against a bona fide indorsee without notice, from claiming the amount of the tax paid.

AGENCY—EVIDENCE OF.—A letter directing a person to make demand for property about to be replevied is admissible to show the agent's authority as such.

Replevin to recover twenty barrels of whiskey. On August 23, 1894, the United Growers' Company sold to one J. Librovicz twenty barrels of whiskey, giving him a receipted bill therefor, and delivered to him three warehouse receipts, receiving from him in payment for the whiskey his acceptances for the price

agreed upon. The whiskey was manufactured by the Old Colonies Distilleries Company, and prior to the above transaction had been stored in their warehouse. On twenty-third of August, 1894, Waterhouse, the defendant, as manager and acting in behalf of said distilleries company, paid the revenue tax on the whiskey, and at the request of the United Growers' Company, who had become the owners of the whiskey, filled out said warehouse receipts, stamped them with the words "tax paid," and delivered them to said company. Librovicz, after receiving such warehouse receipts, indorsed them in blank and delivered them to the State Bank, plaintiff, as collateral security for a note which the bank on that day discounted for him, and no part of which has ever been paid. On January 22, 1895, Librovicz having, in the meantime, become insolvent, the plaintiff wrote above his indorsements on such warehouse receipts the words "Deliver M. Zunder & Sons, or order," and sent them to the latter with instructions to withdraw such whiskey from the warehouse, pay storage charges, and ship it to him, whereupon Zunder showed his receipts, demanded delivery of the whiskey, and offered to pay all storage charges on such whiskey. The defendant refused to deliver the whiskey until repaid the amount of revenue tax paid out by him, and also the amount which Librovicz had agreed to pay the Growers' Company for such whiskey. Librovicz never paid any part of his acceptances to the Growers' Company, and it brought suit and recovered judgment against him for the full amount thereof. In December, 1894, the Growers' Company also brought another suit against Librovicz, making the distilleries company a party thereto and serving process in such action upon the defendant Waterhouse. Upon the trial of this action in the court below, the following findings, referred to in the opinion, were made by the trial judge: "11. Upon the trial plaintiff called as a witness one J. J. Kennedy, the stamp deputy for the internal revenue collector at the city of New Haven, who testified in chief that August 23, 1894, the defendant called at said collector's office and paid the government tax on the twenty barrels of whiskey in question. Upon cross-examination, he was asked the following question: 'Q. And as soon as the tax was paid Mr. Waterhouse removed it, didn't he?' (referring to the removal of the whiskey from the bonded warehouse to the public warehouse). To this question counsel for the plaintiff objected, on the ground that it was irrelevant, immaterial, and foreign to the examination in chief. The objection was sustained. The defendant's counsel duly ex-

cepted. 12. The plaintiff offered one Oscar L. Richard, its president, as a witness, who testified that the letter hereto annexed as Exhibit D, was written with his knowledge and by his direction, by J. H. Rosenbaum, cashier of said bank, but now dead; and the plaintiff then offered said letter in evidence, stating that it would be shown by other witnesses that said warehouse receipts were inclosed with said letter and sent to and received by M. Zunder & Sons with said letter. The defendant's counsel objected to the introduction of said letter, as irrelevant, immaterial and *res inter alios*. The objection was overruled, and an exception duly taken to the ruling by the defendant. The plaintiff afterward, by Allan Durand, assistant cashier of the plaintiff bank, and by M. Zunder, proved that said letter was sent to Zunder & Sons and received by them, and that the receipts, Exhibits A, B, and C, were inclosed with the letter when so sent and received. 13. Said Richard testified in chief to the negotiations which took place between himself as the representative of the plaintiff, and said Librovicz, concerning the loan of August 29, 1894, above referred to, and the giving of said collateral. Upon cross-examination, the witness (who, it appeared, was a member of the firm of Richard & Co., doing a banking and forwarding business, which firm was a creditor of said Librovicz) was asked whether he attended a meeting of the creditors of said Librovicz in New York, which was held October 19, 1894. The witness answered in the affirmative, when he was asked by defendant's counsel the following question: 'Q. And didn't you say at that time (referring to the creditors' meeting) that Librovicz had transferred to you property to the value of more than one hundred thousand dollars to secure the claim of Richard & Co. and the bank, and that if the creditors would give him an extension of three, six, nine, and twelve months, that you would turn the property all back?' To this question counsel for the plaintiff objected, on the ground that it was irrelevant, immaterial, and outside the direct examination of the witness. The objection was sustained. Counsel for the defendant duly excepted. 14. One Herman A. Curiel, president and treasurer of said Growers Company, was called as a witness by the defendant, and having testified to certain conversations had by him with said Richard relative to the arrangement between the plaintiff and said Librovicz touching the two thousand dollar loan and delivery of Exhibits A, B, and C to the plaintiff, he was asked by the defendant's counsel the following question: 'Q. Passing that, then, Mr. Curiel, was any state-

ment made by Mr. Richard at that time with regard to the claim of either himself or the bank against Mr. Librovicz? I do not ask what it was, but I ask first, whether any statement was made about it.' Plaintiff's counsel objected to the question. The court sustained the objection and excluded the question so far as it called for statements made by Richard regarding his own claim or that of his firm. Defendant's counsel duly excepted to the ruling. 15. Defendant's counsel asked said witness, Curiel, this question: 'Q. I think I last directed your attention, Mr. Curiel, to something that was said then at the creditors' meeting, and you made a statement as to what then occurred; now I want to ask you in this connection whether any statement was exhibited of the liabilities and assets of Librovicz?' To this question the plaintiff's counsel objected. Defendant's counsel claimed it was admissible in connection with testimony to be offered as to what Richard had said at said meeting about his and the plaintiff's relations to said Librovicz. The court sustained the objection and excluded the question, but permitted the defendant to give testimony as to all that said Richard stated relative to the plaintiff's claim to said certificates, or its relations to and negotiations with said Librovicz, and its claims against him and his estate. Such testimony was introduced by the defendant, and said Richard was afterward called by plaintiff in rebuttal, and was examined and cross-examined as to his statements bearing upon said matters." Plaintiff recovered judgment and defendant appealed.

C. S. Hamilton, for the appellant.

J. H. Webb, and S. Spier, for the appellee.

⁸⁵ ANDREWS, C. J. The plaintiff, being the indorsee and holder of the warehouse receipts, was the owner of the goods described therein. Such a receipt is regarded as representing the goods described in it; and an assignment of the receipt by an indorsement of it is, in the eye of the law, considered as equivalent to a delivery of the property itself. These receipts transferred to the plaintiff the legal title to the property and its constructive possession; and the defendant, as the warehouseman, from the time the plaintiff received the receipts, became its bailee and held the property for it. The delivery to it of the evidence of title was equivalent, in the then situation of the property, to the delivery of the property itself: *Gibson v. Stevens*, 8 How. 384, 399; *First Nat. Bank v. Dean*, 137 N. Y.

110; *Cushing v. Breed*, 14 Allen, 376, 380; 92 Am. Dec. 777; *Jones on Pledges*, sec. 280; 28 Am. & Eng. Ency. of Law, 673; *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350; *Harris v. Bradley*, 2 Dill. 284; *Young v. Lambert*, L. R. 3 Com. P. 142; *Barber v. Meyerstein*, L. R. 4 H. L. Cas. 317; 1 ⁸⁶ Smith's Leading Cases, pt. 2, p. 1197. Our statutes, section 3971, establish this general law as the law of this state.

It is unnecessary to discuss whether or not our statute gives to this kind of receipt the character of full negotiability. We leave that until the case may arise. The plaintiff was, in any aspect, sufficiently the owner of the goods replevied to be entitled to the immediate possession of the same, unless there was enough in the claim made by the defendant to deprive it of such right. The defendant claimed that there was an agreement between him and the Growers Company, to which Librovicz assented, that the whiskey should remain in the warehouse until the money he had advanced to pay the United States revenue tax thereon should be repaid to him; and that there was an agreement by Librovicz with the Growers Company that the whiskey should remain in the warehouse until the purchase price was paid, and that he, the defendant, had been instructed by the Growers Company to hold the whiskey until these amounts should be discharged. It is found as a fact that the plaintiff had no knowledge of these agreements. We think, therefore, that the plaintiff cannot be affected by them. It would violate the character of these receipts to hold otherwise.

The defendant also claimed that the plaintiff had constructive notice of these liens by the language of the receipts themselves; that as the receipts provided that the whiskey was to be delivered to Librovicz or his order "after the payment of the United States internal revenue tax and all other amounts due," the plaintiff was informed that some amounts were due which he was to pay, besides the revenue tax. We do not so understand this language. We think the "other amounts due" could only be held to mean proper warehouse charges; as, for instance, the storage charges. And here again the character of these receipts and the purpose for which they were intended forbids any such claim as is made by the defendant. Besides, it seems to us that the defendant and the Growers Company are estopped to make any such claim; the Growers Company by their unconditional bill of sale, and the defendant by the receipt which he had himself ⁸⁷ stamped with the words "tax paid" and then issued: *McNeil v. Hill*, 1 Woolw. 96; *Van Santen v. Standard Oil Co.*,

81 N. Y. 171; *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333.

The question asked of the witness Kennedy was properly excluded. It was not cross-examination. The same may be said of the questions asked of the witness Richard, as set forth in paragraph 13 of the finding. The witness had not in chief testified as to any such matter.

The matter in respect to which the witness Curiel was interrogated, as described in paragraphs 14 and 15 of the finding, seems to us to have been one with which the plaintiff was not connected. It was between other parties. The letter, Exhibit D, was properly admitted. It was a part of the plaintiff's case. It was a part of the evidence to show the authority of M. Zunder & Sons, as agents of the plaintiff, to demand the whiskey of the defendant.

There is no error.

In this opinion the other judges concurred.

WAREHOUSEMEN—WAREHOUSE RECEIPTS—NEGOTIABILITY.—A certificate or receipt issued by a warehouse and storage company is negotiable, and a purchaser thereof in good faith, and without notice of any fact to put him on inquiry, is entitled to receive from the company the property described on payment of lawful charges: *Hanover Nat. Bank v. American Dock etc. Co.*, 148 N. Y. 612; 51 Am. St. Rep. 721, and note. See extended note to *Rice v. Cutler*, 84 Am. Dec. 752-754. The warehouseman thereby becomes the bailee of the transferee: *Zellner v. Mobley*, 84 Ga. 746; 20 Am. St. Rep. 390.

WAREHOUSEMEN—RECEIPTS OF—RIGHTS OF TRANSFEREES.—A purchaser of a warehouse receipt for grain subject to charges for storage will be personally bound for the storage, even though he has removed the grain with the consent of the warehouseman: *Cole v. Tyng*, 24 Ill. 99; 76 Am. Dec. 735.

BROOKS v. BENHAM.

[70 CONNECTICUT, 92.]

MORTGAGE OF SEVERAL PARCELS SOLD TO DIFFERENT PURCHASERS—APPORTIONMENT OF DEBT.—A mortgagee of several parcels of land, which together are worth more than the amount of his debt and are subsequently sold by the owner of the equity of redemption, at the same time to different persons, cannot release his security as to any parcel in such manner as to increase the burden on the rest. He has no right, without the consent of all, to bargain with any of these purchasers for the release of his parcel on payment of less than its fair share of the whole debt. The mortgagee, therefore, releases at his peril if he has notice of the conveyances out of which the equities in

question arise, and if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the receipt of such share in favor of the remaining parcels.

MORTGAGES—APPORTIONMENT OF DEBT.—An oral offer by the mortgagee at an auction sale of the premises mortgaged to let certain sums remain on each parcel of the tract sold, does not constitute an apportionment of the mortgage debt. Such offer, unless accepted, amounts to nothing, and if accepted could only be made effectual by future conveyances between the parties.

MORTGAGES. — APPORTIONMENT OF MORTGAGE ENCUMBRANCES made between the mortgagee and purchasers of certain parcels of the mortgaged premises cannot affect purchasers of other parcels of the same tract who were not consulted and gave no consent.

MORTGAGES—SATISFACTION OF—WHAT IS NOT.—A mortgage debt is never satisfied by the mere acceptance of a conveyance of the equity of redemption as to part of the security.

Suit to foreclose two mortgages. In 1886, E. A. Benham mortgaged a ten-acre tract of land, mapped out into twenty-eight building lots, for four thousand five hundred dollars to the plaintiff, Brooks, who subsequently released three of the lots to the mortgagor. Afterward, the defendant mortgaged the residue of the tract, worth ten thousand two hundred and twenty dollars, for eighteen hundred dollars to the plaintiff. Afterward, plaintiff released two more lots, worth nine hundred and seventy-five dollars, to the mortgagor, who thereupon paid him five hundred dollars in reduction of the second mortgage. Benham subsequently made an assignment in insolvency, and the trustee sold his equity of redemption at auction, having first endeavored, without success, to induce the plaintiff to apportion the amount due him among the several lots. Plaintiff attended the auction, at which the equity in each lot or group of lots was sold separately, and named to the auctioneer, as each sale was made, the amount that he was willing to allow to remain on that land if the purchaser desired; and the auctioneer stated such sums to those present. These sums altogether amounted to a little more than was due the plaintiff, his object being to make his security good and avoid redemption of the property. There was no promise on the part of purchasers to pay any part of the mortgages which were of record. The deed to each purchaser described his lot as subject to several mortgages. The sums which it was stated by the auctioneer could remain upon the lots were as follows: On lot 1, three thousand dollars; on lots 2 and 3, five hundred dollars each; lots 5, 7, 9, 11 to 18 inclusive, 24, and 25 one hundred and fifty dollars each; lots 19, 20, 22, 26, 27, 28, to-

gether, five hundred dollars. Lot 1 was really worth only two thousand three hundred dollars, and the equity was bought in for one dollar in behalf of Benham, and conveyed by the purchaser to Mrs. Benham. Lot 2 was worth six hundred dollars, and it was afterward conveyed to Mrs. Benham. Afterward the plaintiff released his lien on sixteen of the lots to their respective purchasers, on payment to him of the sums which the auctioneer had stated could remain on them. He also took from the purchasers of five other lots quitclaim deeds of their titles, and gave to each his bond to sell and convey his lot to him for the amount which the auctioneer had stated could remain on it. From the purchasers of each of the other lots, the plaintiff received either the amount which had been stated could remain upon it or a conveyance of the equity as payment of said amount. Mr. and Mrs. Benham were the only defendants in the foreclosure suit. Mrs. Benham claimed that she had received conveyances to lots 1 and 2; that plaintiff had taken possession of all of the other lots, and from the proceeds of sales and rents had received more than his mortgage debt before Benham's insolvency. She claimed an account and release if the mortgage debts had thus been paid in full, and, if not, a release upon payment of such proportion of the remaining indebtedness as the value of her lots bore to the value of all of the land mortgaged. It was left for the court to determine whether what was said and done at the auction sale constituted an apportionment of the mortgage incumbrances binding upon the defendants. The trial court held: "That there was no apportionment at or before the auction sale; that each lot must bear its proportional part of the mortgage indebtedness, those released bearing their part as it might exist at the time of the release; that the several payments to the plaintiff, for each release, must be applied in reduction of his mortgage debt, and if less than the proportional part of that debt which they ought, in view of their real value, to have borne, that he should be charged enough more to make up the deficiency; and that when the plaintiff secured the equity in certain of the lots without the consent of the owners of the equities in the other lots, he by his conduct released the remaining lots from the burden of the mortgages to the extent of the then value of those lots which he himself obtained, and the remaining lots were to be charged only with the balance thereafter remaining due under the mortgages." Judgment for the plaintiff, and defendants appealed.

C. W. Gillette and J. O'Neil, for the appellants.

F. M. Peasley, for the appellee.

96 BALDWIN, J. He who takes a mortgage of several parcels of land, which together are worth more than the amount of his debt, and are subsequently sold by the owner of the equity of redemption, at the same time, to different persons, owes a 97 certain duty to each of these. He ought not to release his security as to any parcel in such a manner as to increase the burden on the rest. He has no right, without the consent of all, to bargain with any of these purchasers for the release of his parcel, on payment of less than its fair share of the whole debt. While the whole of the debt is secured by the whole of the land, each parcel of the land, as between the different proprietors, is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land; and if its owner should be compelled to redeem the mortgage, he can resort to the others for a ratable contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage encumbrance is to make, as respects that, any such subrogation impossible. The mortgagee therefore releases at his peril, if he had notice of the conveyances out of which the equities in question arise; and if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the receipt of that share, in favor of the owners of the remaining parcels: *Stevens v. Cooper*, 1 Johns. Ch. 425; 7 Am. Dec. 499. It was this position which the plaintiff occupied with relation to the defendants, and the decree appealed from correctly enforces their resulting equities.

It is properly held by the superior court that what was said and done at the auction sale did not constitute an apportionment of the mortgage encumbrances. An oral offer was made to let certain sums "remain" on each parcel sold; but such offers amounted to nothing unless accepted, and then could only be made effectual by future conveyances between the parties. It appears that no offer was accepted at the time of the sale, nor, in view of the statute of frauds, would such an acceptance have created an actionable obligation.

The dealings of the plaintiff with certain of the purchasers after the sale, and the resulting conveyances, constituted an apportionment as between him and them; but could not operate to the prejudice of the defendants, who were not consulted and gave no consent.

⁹⁰ The defendants claim that the plaintiff's release of certain of the lots, upon payment of part of the mortgage debt, was equivalent to a foreclosure, and therefore paid the whole debt.

The ancient law of this state was, that when a strict foreclosure became absolute, this appropriation of the land extinguished the obligation of the mortgagor, and under our present statutes a similar result may now follow, under certain conditions: *Ansonia Nat. Bank's Appeal*, 58 Conn. 257. But these statutes deal only with judicial foreclosures. Such proceedings afford an opportunity to settle all matters of controversy growing out of the mortgage indebtedness, and it is only when the plaintiff does not choose to avail himself of this opportunity that he is debarred from any further recovery in subsequent proceedings. Transactions between the mortgagor and mortgagee, out of court, are left to be regulated by the common law and the general principles of equity. Under these a mortgage debt is never satisfied by the mere acceptance of a conveyance of the equity of redemption as to part of the security.

The acceptance by the plaintiff, in February, 1894, of conveyances of the equities of redemption in five of the lots sold by the trustees in insolvency extinguished the lien of the mortgage upon them, and they were properly charged against him by the superior court, in stating the account between him and the defendants, at eighteen hundred dollars, which was their market value, although that exceeded their ratable contributory share of the total indebtedness then existing. His agreement, made six months later, to sell them for what he had promised should "remain" upon them, amounting in all to eleven hundred dollars, cannot affect the fact that he had previously discharged them from the mortgage lien, and appropriated them fully to his own use, without obtaining the defendant's consent.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

MORTGAGE—PARTIAL RELEASE—RIGHTS OF MORTGAGOR.—The mortgaged premises constitute the primary fund out of which the mortgage debt is to be paid, and the mortgagee cannot arbitrarily release portions of the premises for less than their actual value without the consent of the mortgagor, and, if he does so, he must, on foreclosure, credit the mortgagor with the value of the premises released: *Woodward v. Brown*, 119 Cal. 283; 63 Am. St. Rep. 108. If a mortgagee releases part of the mortgaged premises after other parts have been sold, having notice of the prior sale, he thereby releases the property first sold, if the property actually released by him is of sufficient value to pay the mortgage debt: *Turner v. Flenniken*, 164 Pa. St. 469; 44 Am. St.

Rep. 624. See *Taylor v. Short*, 27 Iowa, 361; 1 Am. Rep. 280; *Stevens v. Cooper*, 1 Johns. Ch. 425; 7 Am. Dec. 499.

MORTGAGE—DISCHARGE OF.—Nothing short of actual payment of the debt or an express release will operate to discharge a mortgage: *Kern v. Hotelling*, 27 Or. 205; 50 Am. St. Rep. 710, and note. A mortgagor may surrender his right of redemption for good cause, thus rendering the mortgage absolute: *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; but a purchase by a mortgagee of the equity of redemption does not extinguish the mortgage so as to release a surety for the mortgage debt where such was not the creditor's intention: *Oullum v. Emanuel*, 1 Ala. 23; 34 Am. Dec. 757; or where it is to the latter's interest to keep the mortgage alive: *Vannice v. Bergen*, 16 Iowa, 555; 85 Am. Dec. 531.

GUSTAFSON v. RUSTEMEYER.

[70 CONNECTICUT, 125.]

VENDOR AND VENDEE—REPRESENTATIONS AS TO VALUE.—A mere naked assertion of value, made between vendor and vendee during negotiations for a sale, though untrue and known to be so by the one who makes it, and relied upon by the other to his hurt, does not constitute an actionable deceit, in the absence of a position of trust or confidence between the parties, or of special knowledge of the value possessed by one, and entirely relied upon by the other.

VENDOR AND VENDEE—FALSE REPRESENTATIONS AS TO VALUE.—A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable, unless the buyer has been fraudulently induced to forbear inquiry as to its truth, and, in that case, the means by which he was induced to forbear inquiry must be specially pleaded.

VENDOR AND VENDEE—FALSE REPRESENTATIONS—REMEDY.—A vendee induced to purchase land by false and fraudulent representations, may, acting seasonably, rescind the contract; and after giving, or offering to give, back what he received, recover the consideration, or he may retain the land and recover damages, in a proper action, for deceit.

VENDOR AND VENDEE—FALSE REPRESENTATIONS—MEASURE OF DAMAGES.—In actions to recover for false representations, deceit, or breach of warranty in sales of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented to be.

VENDOR AND VENDEE—FALSE REPRESENTATIONS—EVIDENCE OF.—False representations as to the boundaries and dimensions of land, made by a vendor, are admissible to show fraud inducing the vendee to accept a deed of the property reciting that the acreage thereof is "more or less."

PRACTICE—RULE OF DAMAGES.—If the application of either of two conflicting rules for ascertaining damages leads to substantially the same result, the failure of the court to state which of the two rules it has adopted is harmless error and not ground for a new trial.

Action to recover damages for fraud in an exchange of land. Judgment for plaintiff, and defendant appealed.

W. F. Henney, for the appellant.

J. L. Barbour, for the appellee.

133 **TORRANCE, J.** The first question to be considered is whether the court erred in sustaining the demurrer to the counterclaim. The false representation therein set out and relied upon relates simply to the worth of the Julius street property over and above the encumbrances. It is a mere naked representation of the value of an equity redemption, and nothing more. The general rule is, that a mere naked assertion of value, without more, made between vendor and vendee during negotiations for a sale, though untrue and known to be so by the one who makes it, and relied upon by the other to his hurt, does not constitute an actionable deceit; and this for the reason that such an assertion, in most cases, is, and is understood to be, the statement of an opinion and not of a fact, and the party to whom it is made has no right to rely upon it; and if he does so his loss, if any occurs, is held to be the result of his own folly: *Bigelow on Fraud*, 490; *Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315; *Morse v. Shaw*, 124 Mass. 59; *Homer v. Perkins*, 124 Mass. 431; 26 Am. Rep. 677; *Ellis v. Andrews*, 56 **133** N. Y. 83; 15 Am. Rep. 379; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166; *Shanks v. Whitney*, 66 Vt. 405. See, also, cases cited in note to *Cottrill v. Krum*, 100 Mo. 397; 18 Am. St. Rep. 556.

There are undoubtedly exceptions to this general rule, arising out of the special circumstances under which the representation as to mere value is made; as, for instance, where the one who makes the representation holds a position of trust or confidence toward the other, which gives the latter a right to rely on the representation, or where the seller has or assumes to have special knowledge of the value of the property, and the buyer has no knowledge thereof, and the latter, to the seller's knowledge, trusts entirely to the seller's representation; in such cases the seller may justly be held liable for his false representations, because by them the buyer is fraudulently induced to forbear inquiry as to their truth.

A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was thus induced to forbear inquiry must be specifically set forth in the pleading. "To such representations the maxim *caveat emptor*

applies. The buyer is not excused from an examination, unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only": *Parker v. Moulton*, 114 Mass. 99, 100; 19 Am. Rep. 315; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166.

Upon the counterclaim as it stands, the defendant's case falls within the general rule and not within any of the recognized exceptions. If he desired to bring it within any of these exceptions he should have alleged the specific facts which would bring it within one of them; but this he did not do, and for this reason the demurrer was properly sustained.

In his brief the defendant claims, in substance, that the ¹³⁴ general principles here applied to the statement of facts in the counterclaim, if applied to the facts found, show that the plaintiffs have no cause of action. He says: "Misrepresentations of the dimensions of the farm in question by the defendant to the plaintiff, even though intentional, cannot lay a foundation for an action upon the facts found by the court."

If the defendant were at liberty to make this claim here, it might be shown in reply that the facts set up in the counterclaim, and the facts found, differ very materially, and that this difference may be just the difference between a false representation that is actionable and one that is not. But the defendant, under the statute (Gen. Stats., sec. 1135), is not at liberty to make this claim here, because he did not make any claim of this kind in the court below, nor has he made it in his assignments of error. Under the circumstances of this case, we decline to consider this claim.

The defendant claims that the court excluded the evidence of the value of the Julius street property, as compared with the value of the farm, and that it erred in so doing. Although there is some doubt as to whether the court did absolutely and finally rule this evidence out, we will consider the case as if it had so ruled.

The defendant claimed that the measure of damages was the difference between the value of the farm and the value of the property given in exchange for it; while the plaintiffs claimed that it was the difference between the value of the property which the defendant owned and conveyed, and its value if it had been as represented. From the record it is clear that this

evidence was offered solely as bearing upon the question of damages, and on the assumption that the rule as to the measure of damages was as claimed by the defendant. In his brief the defendant now claims that the evidence was admissible for another purpose, namely, as "tending to show the improbability of his having made the representations complained of." The evidence was undoubtedly admissible for this purpose, and for other purposes; for instance, as evidence, but not conclusive, to show from the price paid the value of the farm conveyed to the plaintiffs: Bigelow ¹⁸⁵ on Fraud, 627, 628; 3 Sutherland on Damages, 592. But the trouble with this claim is, that it was not made in the court below, and cannot be considered now. The question, then, whether the court erred in excluding this evidence, depends on the further question, What is the proper measure of damages in cases of this kind? A vendee induced to purchase land by false and fraudulent representations may, acting seasonably, rescind the contract, and, after giving or offering to give back what he received, recover back the consideration; or he may retain the land and recover damages, in a proper action, for the deceit: Ives v. Carter, 24 Conn. 392, 403; Krumm v. Beach, 96 N. Y. 398; Vail v. Reynolds, 118 N. Y. 297; Pryor v. Foster, 130 N. Y. 171.

The present case is one where the plaintiffs have elected to keep the land and seek to recover for the deceit in an action of tort, and the question is, What is the measure of damages in this action? Upon this question the decisions of the courts of last resort are not in harmony. In one class of cases, the measure of damages is held to be the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented to be; while in the other class of cases it is held to be the difference between the real value of the property retained by the plaintiff, as it was at the time of the purchase, and the value of that which he gave for it. In the former class of cases, the plaintiff is allowed the benefit of his bargain; in the latter, he is not. Morse v. Hutchins, 102 Mass. 439, is an example of the first class of cases, while Smith v. Bolles, 132 U. S. 125, is an example of the other class.

In Morse v. Hutchins, 102 Mass. 440, the court say: "It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted

to be. . . . This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the ¹³⁶ plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract."

In *Smith v. Bolles*, 132 U. S. 129, on the other hand, it was said: "The measure of damages was not the difference between the contract price and the reasonable market value, if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations. . . . The defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation."

Both of these cases relate to sales of personal property, but no distinction is made, in the application of these rules, between sales of personal and sales of real property: *Bigelow on Fraud*, 627; *Sedgwick on Damages*, 2d ed. [559]; 3 *Sutherland on Damages*, sec. 1171; and no good reason has yet been given why there should be any such distinction. Both courts, in the cases above mentioned, recognize the existence of the general rule that the defendant is only liable for such damages as are the natural and proximate result of his fraud, but they differ in applying it. In *Morse v. Hutchins*, 102 Mass. 439, ¹³⁷ the loss of the benefits of his bargain is regarded as one of the elements of plaintiff's damage resulting naturally and proximately from the fraud, while in *Smith v. Bolles*, 132 U. S. 125, such loss is not so regarded.

The general rule in regard to the measure of damages in actions of deception has been stated, and we think correctly, as follows: "The defendant is liable, not for everything that follows upon his fraud, but for what may be presumed to have been within his contemplation at the time, as a man of average intelligence": Bigelow on Fraud, 625. Applying the general rule as thus stated to a case like the present, we think the loss of the benefits of the bargain is one of the elements of damages which the defendant must be held to have contemplated as the natural and proximate result of his conduct, and for which he is therefore answerable. In Bigelow on Fraud, 627, the rule is stated as follows: "It is now well settled that in actions for deceit or breach of warranty in sales, of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be": Citing numerous cases. This is the rule also as stated and favored in 3 Sutherland on Damages, 589, 592. It is the rule adopted and followed in numerous cases relating to the sale of personal property, and it is the rule adopted and followed in the following cases relating to the sale of real estate: Krumm v. Beach, 96 N. Y. 398, and Vail v. Reynolds, 118 N. Y. 297, in New York; Drew v. Beall, 62 Ill. 164, 168; Nysewander v. Lowman, 124 Ind. 584; Page v. Parker, 43 N. H. 363; 80 Am. Dec. 172; Shanks v. Whitney, 66 Vt. 405; Williams v. McFadden, 23 Fla. 143; 11 Am. St. Rep. 345. Moreover, it is the rule adopted and followed by this court in Murray v. Jennings, 42 Conn. 9; 19 Am. Rep. 527. In that case it does not appear to have been much discussed, but its application was directly in question, was indeed the only question in the case, and it was specifically and deliberately adopted and followed. We see no good reason why it should not be considered as the settled rule in this state.

The evidence of the value of the Julius street property, ¹³⁸ then, having been offered solely for the purpose of showing the amount of the plaintiff's damages under the rule laid down in Smith v. Bolles, 132 U. S. 125, was inadmissible, and the court committed no error in excluding it for that purpose.

The defendant further claims that the court erred in holding that all his representations as to the number of acres in the farm "were not embraced in the deed itself and the descriptions contained therein." From the objectionable way in which this matter is stated in the record, by transcript from the stenographer's notes instead of a brief statement of the point by the

court in the ordinary manner, it is a little doubtful just what the precise claim of the defendant was before the lower court upon this point. He seems to claim that, as the false representations were made about a month before the deed was made, they were too remote in time to be admissible; but in his brief he says the court "erred in refusing to hold that all the representations as to the dimensions of the property were embraced and must be found in the descriptive part of the deed itself." He says, in effect, that the representations were made a month before the deed was given, that plaintiffs had ample opportunity during that month to find out whether they were true or false, and that they then accepted a deed repugnant on its face to the representations; and that these facts show that it is "hardly credible that after all these representations the defendant executed, and the plaintiffs accepted, a deed radically different from their tenor."

These facts were entitled to great weight as evidence bearing upon the question whether the plaintiffs relied on such representations, and whether they were made at all, and we must upon this record assume that the court gave to them all the weight to which they were entitled; but in spite of them the court found against the defendant on this point as upon a matter of fact, and we cannot review that finding here.

We understand the real claim of the defendant, upon the point now in question, to be that evidence of the oral representations was inadmissible because it tended to contradict, ¹³⁹ or vary, or add to the deed in some way; that all such representations prior to the deed were merged and embraced in it, and so could not be proved.

This claim is not tenable. The evidence was not offered to contradict, add to, or vary, the deed, but to show the fraud as alleged, which could be shown in no other way. It was offered to show the false representations which induced the plaintiffs to enter into this transaction and to accept the deed. Certain monuments were pointed out by the defendant to the plaintiffs as marking the bounds of the land as to which they were in treaty, which in fact were situated outside of it. This was done with an intent to deceive, and led her to accept the deed subsequently tendered without having the property surveyed or making any further examination as to the number of acres embraced within the boundaries mentioned in the conveyance. Her omission to take such steps was a natural consequence of the fraudulent representations. They had precisely the effect de-

signed by the defendant, and he was properly held responsible for the resulting damage. As was said in *Russell v. Tuttle*, 2 Root, 22: "This action is not laid upon the writing, but for the fraud which can be not otherwise proved than by the testimony of witnesses." In *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313, a vendor orally and falsely represented that a farm contained one hundred and thirty acres, when it contained but one hundred and seventeen, and it was held that although a parol warranty could not be shown as against the deed, fraud in representing the quantity could be shown. In *Whitney v. Allaire*, 1 N. Y. 305, 308, it is said: "For more than thirty years it has been the settled doctrine of the courts of this state that fraudulent representations in reference to the title of real estate, accompanied with damage, is a good cause of action, and that it is immaterial whether any or what covenants are contained in the deed of conveyance."

In *Carvill v. Jacks*, 43 Ark. 439, a vendee induced to accept a deed by false and fraudulent representations, sued for damages for the fraud, and it was held that notwithstanding the deed and its covenants, he could prove the ¹⁴⁰ oral representations. A similar ruling was followed in *Dano v. Sessions*, 65 Vt. 79; *Keefe v. Sholl*, 181 Pa. St. 90; and *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; cases where vendee, after a deed to him, sued for fraud in the sale of real estate. See, also, the following cases where fraud was allowed to be shown notwithstanding the fact that the evidence in one sense tended to contradict a writing: *Cummings v. Cass*, 52 N. J. L. 77; *Mallory v. Leach*, 35 Vt. 156; 82 Am. Dec. 625; *Cole v. High*, 173 Pa. St. 590; *Feltz v. Walker*, 49 Conn. 93-98; *Fox v. Tabel*, 66 Conn. 397-400. The court below did not err in admitting the evidence in question.

In his last assignment of error the defendant claims, in effect, that the court failed to adopt and apply any fixed rule as to the measure of damages, and did not assess them "in accordance with the rules of exact justice." The record shows that the parties upon the trial made specific conflicting claims with respect to the rule of damages, and they were entitled to have the true rule applied, and to know which of the conflicting rules was applied by the court. It was the duty of the court to adopt and apply the rule which the plaintiffs contended for, and it was also its duty to make this known to the parties in some way. The record upon this point is not as clear as it should be. It says: "Adopting either rule, I find from the evidence as to the value of the several properties, that the result would be approx-

imately the same." The fact implied in this statement, that the court had heard and considered evidence as to the value of both properties, would seem to indicate the adoption of the rule which the defendant contended for, while there are other things elsewhere in the record which seem to indicate that the court adopted the other rule. The record does not show, either expressly or by clear implication, which of the conflicting rules the court adopted and applied. Perhaps the fair import of the record is, that in the process of assessing the damages the court applied both rules and, finding the results approximately the same, did not decide which of them was the true rule and exclusively applicable. It was the duty of the court to decide this question, however, ¹⁴¹ and to make its decision manifest in some way to the parties, and this was not done. We think the court erred in this, but if, as is found, the application of either rule leads, in this case, to substantially the same result, it is difficult to see how the defendant has been harmed by the error, and for this reason we do not advise a new trial on account of it.

There is no error.

In this opinion the other judges concurred, except Hammersley, J., who dissented.

MR. JUSTICE HAMMERSLEY in dissenting said that: "False representations as to certain classes of personal property may establish a contract of warranty; this is not true as to representations of the dimensions of land sold. A contract of warranty in such case can only be proved by the writing. The present plaintiff could not have recovered the alleged benefit of his contract in an action for a breach of contract. There was no legal contract of indemnity and he could, therefore, prove no breach and no damage. There was a fraud which induced an exchange of land, and he can recover for the damage resulting from that exchange; but, not as to seems to me, for the loss of the benefit of a contract which he has not made. I think, also, that the error in refusing to assess damages in accordance with a rule adopted by the court, is fatal. If we assume that the judge made a separate assessment under each rule and reached substantially the same result, yet he did not reach the same result, whatever latitude we may give to the word 'substantially.' The assessment adopted must have followed one or the other rule (for the judgment is clearly illegal if he followed neither); and if his judgment following the wrong rule is a single dollar larger than it would have been following the right rule, it involves the violation of a legal right. To sustain the judgment on the ground that no practical injury was done, the assessment under each rule must have been validly made; but the assessment under the rule claimed by the defendant, was made, if not without evidence, yet in the ab-

sence of material evidence which the defendant was not permitted to introduce. I think there is error and that a new trial should be granted."

FRAUD—FALSE REPRESENTATIONS BY VENDOR TO VENDEE.—False representations to constitute fraud must relate to a material fact, and be made with knowledge of their falsity and with an intent that they shall be acted upon, and they must be acted upon, by another to his injury under a reasonable belief that they are true: *Crocker v. Manley*, 164 Ill. 282; 59 Am. St. Rep. 196, and note. Mere expressions of opinion are insufficient: *Ansley v. Bank of Piedmont*, 113 Ala. 467; 59 Am. St. Rep. 122. See *Whiting v. Price*, 169 Mass. 576; 61 Am. St. Rep. 307, and note; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651, and note.

FRAUD—FALSE REPRESENTATIONS BY VENDOR TO VENDEE—MEASURE OF DAMAGES.—The rule of damages for false representations in the sale of land is the difference between its actual value and its value if the alleged facts regarding it had been true: *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 845, and note; *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172, and note; *Mallory v. Leach*, 35 Vt. 156; 82 Am. Dec. 625; *Nash v. Minnesota Title etc. Co.*, 163 Mass. 574; 47 Am. St. Rep. 489.

NEW TRIAL.—Errors or omissions not prejudicial are not ground for a new trial: *Lucas v. New Bedford etc. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; as an error or mistake in the instructions to the jury which could not have altered the verdict: *Ross v. Bank of Burlington*, 1 Ark. 43; 15 Am. Dec. 664; *McConnel v. Kibbe*, 83 Ill. 175; 85 Am. Dec. 265.

SWEENEY v. PRATT.

[70 CONNECTICUT, 274.]

EXECUTIONS—INTERESTS NOT SUBJECT TO.—An obligee in a bond for a deed who has paid no part of the purchase price of the land has no interest therein subject to execution, nor to which a judgment lien can attach.

PAYMENTS—APPLICATION OF—EVIDENCE.—A letter from a creditor to his debtor at the time when a payment is made, showing how the money has been applied, is, upon the debtor's failure to object to such application, admissible in evidence to support the contention of the creditor that the payment was intended to apply to and include a particular note.

ATTORNEY AND CLIENT.—Knowledge of an attorney gained in the very business in respect to which he is attorney is imputed to his client.

ESTOPPEL BY CONDUCT ALWAYS PRESUPPOSES ERROR on one side and fault or fraud on the other.

Suit to foreclose a mortgage and also a judgment lien. Judgment for plaintiff, and both parties appealed.

E. P. Arvine, for the plaintiff, appellant.

C. Thompson, and E. Zacher, for the defendants, appellants.

276 ANDREWS, C. J. We think the trial court decided correctly as to the judgment lien. At the time that lien was **277** placed on the land, May 28, 1890, the said D. and H. Pratt had no interest in the land which could have been levied upon under an execution and on that judgment. They had only a bond for a deed. They had paid nothing whatever on the notes mentioned in the bond. They had no title to the land; they were not even equitably possessed of any right to have a title: Gen. Stats., sec. 3034; Beardsley v. Beecher, 47 Conn. 408, 412; Loomis v. Knox, 60 Conn. 343; Hobbs v. Simmonds, 61 Conn. 235.

The trial court has, in effect, found that the Cheshire Manufacturing Company had discharged the said D. and H. Pratt from the payment of the said sum of \$70 paid for taxes; and this finding is on evidence to which no objection was made. We think this finding was conclusive.

As respects the twenty notes mentioned in the complaint, the only question was and is, How many of them are unpaid? Are there seven unpaid, or are there only three or four? As to these notes the plaintiff is the assignee of the Cheshire Manufacturing Company. He has just such right in the notes and in the mortgage—neither greater nor less—as that company would have if it was the plaintiff. Indeed, to ascertain the plaintiff's rights in this case, we must inquire what rights of that company were conveyed to the plaintiff by its assignment to him. There is no claim that he has parted with anything since he became the assignee. The right so assigned to the plaintiff will be made to appear by an examination of the several transactions which have been had between the said company and the said D. and H. Pratt, and they are as follows: On the sixteenth day of August, 1886, the said company gave to the said Pratts a bond for a deed of the land now in question. The condition of this bond was that the said Pratts should pay to said company their sixteen certain notes, each for the sum of \$437.50, amounting in the whole to \$7,000, and payable as was therein specified. On the same day the said D. and H. Pratt made and delivered to the said company eight other notes, each for the sum of \$625, amounting in the whole to \$5,000, and secured the payment of said last-mentioned notes by a chattel **278** mortgage of certain machinery in a factory then occupied by the Pratts in Naugatuck. On the said series of sixteen notes the said Pratts never paid anything, and never had, and were never entitled to have, a deed, by virtue of the said bond for a deed.

In 1891 negotiations were had between the said company and the Pratts, which resulted in a compromise. The said sixteen notes were surrendered, and the company gave a warranty deed of the land to the Pratts. The Pratts, in payment therefor, made the said twenty notes described in the complaint, and secured the payment thereof by the mortgage now in suit and also by a chattel mortgage on the machinery before mentioned. This machinery was in the factory on the land mortgaged. On the _____ day of _____, 1892, the factory and machinery were totally destroyed by fire, and some dispute arose as to whom the insurance money should be paid. On the fourteenth day of May of that year, at a meeting at which the said company was present by its duly appointed officer, and its attorney E. P. Arvine, Esq., and at which the said D. and H. Pratt were present with their attorney, N. R. Bronson, Esq., an agreement was entered into and executed in duplicate, the material parts of which are as follows: "This agreement witnesseth: That whereas said Herbert Pratt and David Pratt are indebted to said Cheshire Manufacturing Company in sundry notes secured by mortgage on real and personal property situated in said Naugatuck; and whereas a certain factory, situated in said Naugatuck, being a portion of the real estate upon which the said Cheshire Manufacturing Company held a mortgage securing twenty of said notes, was consumed by fire, and a portion of the machinery likewise mortgaged to said company to secure notes was also destroyed; and whereas said property was insured by policies payable to said Cheshire Manufacturing Company as their interest might appear, and also to the said Pratts; and whereas said losses have been adjusted, and there is due on account of the same on said policies the sum of three thousand four hundred dollars; now therefore it is agreed that said \$3,400 shall be ²⁷⁹ immediately paid to said Cheshire Manufacturing Company, to be theirs absolutely, and that if within six months from date hereof the said Pratts shall pay to said company the further sum of \$600, with interest from date to date of payment, said company shall deliver to said Pratts, or to any person by them requested, all notes which it now holds against said Pratts, and which shall fully discharge and release all claims under said mortgages securing said notes, or any other claims against them; or shall assign and transfer the said interests and said claims against said Pratts, and any securities for said claims, to any person or persons by said Pratts suggested; and that if said Pratts shall fail within six months from date to pay said sum of \$600, with

interest as aforesaid, all the notes held by said Cheshire Manufacturing Company shall be payable according to their tenor, and said sum of \$3,400 shall be applied, as on the date of its reception by said company, in discharge of the notes so held by said company as aforesaid that shall be then due and that shall soonest become due, so far as said money shall extend, and the notes so discharged shall be regarded as paid on the date of the payment to said company of said \$3,400."

This agreement was dated May 14, 1892, and was executed by all said parties. It is conceded and is found that the said Pratts did not within six months after said agreement pay, nor have they at any time since paid, said sum of \$600. At that time it was supposed that the sum to be paid on the insurance policies was \$3,400. The amount in fact paid was a little less, viz., \$3,383. At this time there was due from D. and H. Pratt to the said company the said twenty notes mentioned in the complaint, and the sum of \$542.82 on the last note of the said series of eight notes dated on the sixth day of August, 1886, and secured by the chattel mortgage, in all twenty-one notes. The last-mentioned note was not then in the possession of the said company. It was in the hands of its agents, Porter Bros. & Co., for collection, and was to be recalled from said agents by ~~280~~ the counsel of the company. The trial court finds that it was agreed between the parties that the amount due by said note should be paid from the insurance money, and the balance applied toward said twenty notes, upon those first to become due, and after said balance had paid as many notes in full as it could, the remainder should be indorsed on the note next to become due; and that the insurance money did pay the said sum of \$542.82 and thirteen of the said series of twenty notes dated August 1, 1891, in full, and \$117.72 to be applied on the fourteenth note. A few days after the fourteenth of May, 1892, counsel for the Cheshire Manufacturing Company recalled the said note from Porter Bros. & Co., and sent it, together with the thirteen of said twenty notes, to N. R. Bronson, Esq., counsel for the said Pratts, in a letter as follows:

"New Haven, Conn., May 17, 1892.

"Messrs. Terry & Bronson.

"Gentlemen:

"Inclosed you will find the New York note, with statement of Porter Bros., amount due, \$542.82. We have received from the insurance companies \$3,383, not \$3,400—\$3,383.00 less

\$542.82 leaves \$2,840.18 toward canceling the notes secured by real estate; that is to say, the 20 notes.

"Thirteen of these notes amount to \$2,600.00. Interest to May 14, 1892, 6 per cent, \$122.46. Total, \$2,722.46. \$2,840.18 less \$2,722.72, leaving \$117.72 to be indorsed on the fourteenth note.

"I send the old note and the 13 secured by mortgage on real estate, and have indorsed \$117.72 on the fourteenth note.

"Respectfully yours,

"E. P. ARVINE."

This letter with the notes included was received by Mr. Bronson and by him made known to his clients, the Pratts, or to one of them. Neither Mr. Bronson nor either of the Pratts made any objection to the application of said insurance money which had been made by the Cheshire Manufacturing Company as indicated in said letter, till the trial of this case, a period of nearly five years. On the twenty-first day of July, 1892, the Cheshire Manufacturing Company ²⁸¹ released the chattel mortgage by which the said series of eight notes had been secured. Of this series the said \$542.82 note was the last.

No payment, either of principal or interest, has been made on the said seven notes—the last to become due of the said series of twenty—since the said fourteenth day of May, 1892. They are all still due and unpaid; and there is interest due from said May 14, 1892, to April 14, 1897, amounting to the sum of \$315.22.

The said Cheshire Manufacturing Company conveyed all its interest in said seven notes and in the mortgage security therefor, on the third day of October, 1896, to the plaintiff, who has been ever since, and is now, the owner of the same.

On the twenty-eighth day of May, 1894, the defendant Curtis Thompson loaned to the said D. and H. Pratt the sum of \$570, and to secure the note therefor took a second mortgage of said land. At that time Thompson examined the land records. The Pratts showed him the said agreement of May 14, 1892, and represented to him that the sum of \$3,400 had been paid on said twenty notes, so that there was then due on the said notes and secured by the prior mortgage, only \$600. The mortgage to Thompson was at once recorded.

Upon the trial the defendant offered the testimony of the said David Pratt and Herbert Pratt, and claimed to have proved thereby that it was the intent of the parties to the said agreement of May 14, 1892, not to have any part of the insurance

money applied in payment of the said \$542.82 note. In rebuttal of this testimony, the plaintiff offered the letter of May 17, 1892, and in connection therewith the testimony that since said letter was received the Pratts had never objected to the application of the insurance money by the Cheshire Manufacturing Company, as was therein stated.

We think this letter with the evidence was properly admitted. If the Pratts really understood that the said note was not to be paid out of the insurance money, it is incredible that they should not have so stated when this letter came to Mr. Bronson. Their conduct then was an admission that ²⁸² that note was to be paid out of that money. And in this respect, the fact that the letter was shown only to one of the Pratts is not of much consequence. Mr. Bronson was the attorney of both in this agreement. His knowledge of the application of the money made by the Cheshire Manufacturing Company was the knowledge of the Pratts. The knowledge of an attorney gained in the very business in respect to which he is attorney, is imputed to his client. The notice to Mr. Bronson given by the said letter was notice to his clients: *Melms v. Pabst Brewing Co.*, 93 Wis. 153; 57 Am. St. Rep. 899; *Constant v. University of Rochester*, 111 N. Y. 604; 7 Am. St. Rep. 769.

The defendant Thompson claims that the plaintiff is estopped to assert that there is more than \$600 due on said series of twenty notes. We are not able to find any ground for this claim. The recording of the mortgage to Thompson did not affect any right of the Cheshire Manufacturing Company in the land, or in the unpaid notes. The plaintiff sues to enforce a right which came to him from the Cheshire Manufacturing Company. No estoppel can exist against him unless one could have been set up against that company had it been the plaintiff. An estoppel by conduct always presupposes error on one side and fault or fraud on the other: *Morgan v. Railroad Co.*, 96 U. S. 716, 720. However much the defendant Thompson may have been in error, there is not the slightest pretense of any fault or fraud on the part of the manufacturing company, nor, indeed, on the part of the plaintiff.

There is no error.

In this opinion the other judges concurred.

EXECUTION—LANDS HELD UNDER BOND FOR TITLE.—A purchaser's interest in land covenanted to be conveyed to him by a bond for title is not subject to the levy of an execution, unless the purchase money has all been paid: *Harmon v. James*, 7 Smedes

& M. 111; 45 Am. Dec. 296, and note; Pitts v. Bullard, 3 Ga. 5; 46 Am. Dec. 405. See monographic note to McIlvaine v. Smith, 97 Am. Dec. 311.

ATTORNEY AND CLIENT.—Notice given to, or knowledge gained by, an attorney while acting for his client is imputed to the latter: See monographic note to Melms v. Pabst Brewing Co., 57 Am. St. Rep. 914.

ESTOPPEL IN PAIS—ESSENTIALS.—To constitute estoppel in pais there must be a false representation or concealment of known material facts made to a party ignorant of their truth or falsity, and made with the intent that the latter party would act upon them, and he must have so acted upon them: Blodgett v. Perry, 97 Mo. 263; 10 Am. St. Rep. 307; Estis v. Jackson, 111 N. C. 145; 32 Am. St. Rep. 784, and note.

SECURITY COMPANY v. SNOW.

[70 CONNECTICUT, 288.]

WILLS—PERPETUITIES.—A devise in remainder to the "lawful heirs" of the testator's daughter after the latter's death, of any balance remaining out of a trust fund set aside for such daughter, is void under the Connecticut statute against perpetuities.

WILLS.—DOCTRINE OF APPROXIMATION can never be invoked in construing a will when its application would sacrifice the main object of a testator to one of his incidental purposes.

WILLS—CONSTRUCTION—TRUSTS.—Under a will devising a specified share of the testator's property to his daughter for her sole and separate use, and a codicil revoking such provision, and devising such share to the testator's wife in trust, to invest and manage it, and pay and deliver it over to such daughter from time to time during her life as the wife might deem for the best interests and welfare of such daughter, the latter is entitled upon the death of her mother to demand and recover from a trustee appointed in place of such mother the balance remaining of such share, as such trustee has no discretionary power to withhold any part of such share.

WILLS—CONSTRUCTION.—REVOCATION BY CODICIL of a provision of a will with regard to a specified share of an estate indissolubly coupled with the creation of a substituted provision in regard to such share, fails, and the original provision of the will becomes operative, when such substituted provision becomes inoperative.

Action by a testamentary trustee to determine the construction of the will of A. F. Snow, deceased, which, after providing for his widow, declared as follows: "All the rest and residue of my property and estate, wheresoever being, I give, bequeath, and devise in equal proportions to my son Alpheus H. Snow, to my daughter Ellen Snow, and to my daughter Alice D. Snow, to them and their heirs forever, the railroad stocks to be divided without sale, but the share of my daughter Alice in such stocks not to be transferred to her until she shall be twenty-seven

years old; the dividends thereon in the meantime to be paid to her by my executor, and the legacies to my daughters, in case of marriage, to be to their sole and separate use, free from the control or interference of their husbands." The testator subsequently made a codicil to such will as follows: "1. I revoke and annul any and all gifts, bequests, legacies, and devises to my daughter Alice D. Snow, in or by virtue of said last will and testament; 2. I give, bequeath, and devise to my wife, Sarah M. Snow, any and all property and estate which was given, bequeathed, and devised to my said daughter in and by virtue of said last will and testament, in trust, however, to be invested and managed by my said wife, and to be paid and delivered and conveyed by my said wife to my said daughter from time to time during her natural life as my said wife may deem for the interest and welfare of my said daughter, and any portion of said property and estate or the net income thereof which shall not be paid, delivered, and conveyed as aforesaid to my said daughter during her natural life shall at her decease be paid, delivered, and conveyed to her lawful heirs." After the death of the testator his estate was duly probated and settled. The widow never paid over the principal of the estate distributed to her in trust, but did pay over part of the income thereof during her lifetime. She died in 1885, and in 1896 the plaintiff was appointed trustee in her stead by the probate court. The daughter Alice intermarried with one C. D. Burrill shortly before her father's death, and has one minor child living.

C. E. Gross, for the Security Company, and J. M. and A. L. Burrill.

J. T. Hubbard, and C. D. Burrill, for Alice D. and C. D. Burrill.

A. H. Snow, for himself and Ellen Snow.

291 BALDWIN, J. The main scheme of the will in question was to make suitable provision for the testator's widow, and then divide his residuary estate equally between his three children; the shares of his daughters, in the event of their marriage, to be held to their sole and separate use. The codicil was made for the single object of placing the share of Alice under the control of his wife, as trustee for her benefit, with large discretionary powers. Mrs. Snow was directed to pay and convey the trust estate to Mrs. Burrill from time to time, as she, the trustee,

might deem for the interest and welfare of Mrs. Burrill; and any portion of the estate "or the net income thereof" not so paid and delivered ²⁹² to her during her life, was at her decease to go to her "lawful heirs."

The trustee was not required to pay over the annual income from the estate to Mrs. Burrill during her life. The trust created was such that it might be terminated at any time during her life, at the discretion of the trustee. Whether it should endure for a few months or for many years was to be determined by Mrs. Snow, in view of what she might consider to be the true interest of Mrs. Burrill. The testator apparently thought it uncertain whether that would be promoted by her having in her own control either the entire principal or the entire income. He contemplated it as possible that part of the income might be withheld from her during her life; and made provision for that contingency, by the same gift in remainder, which he intended to carry to her lawful heirs any of the principal that might, at her decease, remain in the hands of the trustees.

The death of Mrs. Snow, before making over to Mrs. Burrill any considerable portion of the estate, rendered it thenceforth impossible to promote his daughter's interest and welfare in the manner contemplated by the testator. The discretionary powers which he gave to his wife for that purpose were purely personal and ended with her life. If the trust is to continue during Mrs. Burrill's life, there can be no further surrender to her of any portion of the principal, and either all the accruing income must be paid to her, or none. There is no express authority for paying over any of it, and if authority can be implied from the evident purpose of the testator to provide for her proper support, it must be conceded without limits.

The gift in remainder to her "lawful heirs" is void by reason of the statute of perpetuities which was in force when the testator died, under the rule laid down in *Leake v. Watson*, 60 Conn. 498.

If, then, the decease of Mrs. Snow left it possible to give the second article of the codicil any further effect, it can be only to keep the estate in the custody of the plaintiff during Mrs. Burrill's life, and give her meanwhile the entire income. ²⁹³ This may amount to a greater sum than the testator thought it might be best for her to use under some circumstances, and a less sum than he thought it might be best for her to use under other circumstances. The person on whose judgment of her circumstances he depended for measuring out from time to time

what on the whole would best promote her welfare, is no longer in existence. His will, therefore, as expressed in this article, cannot now be carried out, as to the disposition either of the income or principal of the trust estate.

If the plaintiff can retain the fund until the decease of Mrs. Burrill, it must be under the doctrine of approximation; but this can never be invoked where its application would sacrifice the main object of a testator to one of his incidental purposes: *Hayden v. Connecticut Hospital*, 64 Conn. 320, 324. The main object of this article of the codicil was to benefit Mrs. Burrill by giving her whatever it was best for her to receive, both of the principal and income, of a share in his estate equal to that left to his other children. The provision for her heirs was inserted in view of an incidental contingency. Nothing was to come to them which it might be deemed judicious to turn over to her. During the life of Mrs. Snow the trust might have been given full effect, but only by a transfer of the entire estate to Mrs. Burrill. That not having been done, it is no longer susceptible either of complete execution, or of partial execution in such a way as to satisfy the testator's design.

The first article of the codicil expressly revokes the disposition made in the will in favor of Mrs. Burrill, but it is apparent that this was done not to diminish her equal share in the estate, but to transfer it to a trustee so as to secure it more effectually for her benefit. "I give to my wife in trust," says the testator, "any and all property and estate which was given, bequeathed, and devised to my said daughter in and by virtue of said last will and testament." It being his manifest intention to revoke the provision in the will only for this purpose, so far as the purpose fails of effect, the revocation must fall with it. Both articles of the codicil must ²⁹⁴ be taken together to ascertain his true meaning. It was no part of this that he should die intestate in respect to the third of his residuary estate with which alone he was dealing. The revocation of his former provision for Mrs. Burrill was indissolubly coupled with the creation of the substituted provision. It may be given effect, so far as the substitution is valid, but no farther, because so only can the plain purpose of the testator be attained, and the mutual dependence of the two articles of the codicil preserved. The whole instrument was a single testamentary act, and must be read as if the testator had expressly declared that he revoked the gift made to Alice in his will simply in order to put it in a different form: *Rudy v. Ulrich*, 69 Pa. St. 177, 183; 8 Am. Rep. 238; *Stickney*

v. Hammond, 138 Mass. 116, 120; **Powell v. Powell**, L. R. 1 Pro. & D. 209.

The rule of construction upon which we proceed is analogous to that governing a revocation which is grounded on a state of facts which proves not to exist. It falls when its foundation falls: **Dunham v. Averill**, 45 Conn. 62; 29 Am. Rep. 642.

The case of **James v. Marvin**, 3 Conn. 576, which holds that a revoking clause in a second will destroys the first, whether the second ever becomes effective as a testamentary act or not, was decided before our present statute of wills was enacted, and is therefore inapplicable to the question before us: **Peck's Appeal**, 50 Conn. 562; 47 Am. Rep. 685.

The provision made in the will for Mrs. Burrill stands, therefore, unrevoked, except so far as her interest during the life of Mrs. Snow was placed under the latter's control. The trust was separable, and to that extent valid: **Wheeler v. Fellows**, 52 Conn. 238, 247; **Morris v. Bolles**, 65 Conn. 45; **Ketchum v. Corse**, 65 Conn. 85. Mrs. Snow could withhold the estate from her in whole or part, but the plaintiff has no such power. Mrs. Burrill's absolute title under the will, which was temporarily abridged or suspended under the second article of the codicil, resumed its original character upon the decease of Mrs. Snow, and the plaintiff holds simply upon a resulting trust in her favor.

The superior court is advised that the gift over to the lawful heirs of Alice D. Burrill is void; that the trust terminated ²⁹⁵ at the decease of the original trustee; that the discretionary power given to that trustee cannot be exercised by the plaintiff as her successor; and that Alice D. Burrill became entitled, at the decease of Mrs. Snow, to demand and receive from the plaintiff the whole of the trust estate, to be held by her to her sole and separate use.

In this opinion the other judges concurred.

DEVISE—RULE AGAINST PERPETUITIES.—In Connecticut and Ohio an estate can be granted only to persons in being and to their immediate issue or descendants: See monographic note to *In re Walkerly*, 49 Am. St. Rep. 118, on the rule against perpetuities.

WILLS—HOW MODIFIED BY CODICILS.—A will and codicil are to be taken and construed together as parts of one and the same instrument: **Beall v. Cunningham**, 3 B. Mon. 390; 39 Am. Dec. 469; **Westcott v. Cady**, 5 Johns. Ch. 334; 9 Am. Dec. 306. Unless a codicil cannot otherwise be conceded its proper effect, it does not operate as a revocation of a will either total or partial: See monographic note to **Graham v. Burch**, 28 Am. St. Rep. 353; for the dispositions of a will are not to be disturbed by a codicil further than is absolutely necessary to give it effect: Extended note to **Harvey v. Chouteau**, 55 Am. Dec. 127.

BENNETT v. PACKER.

[70 CONNECTICUT, 357.]

WILLS—CONSTRUCTION—ABSOLUTE DEVISE OR CONDITIONAL LIMITATION.—If a testator by one clause of his will bequeaths the residue of his property to his wife, and, in a subsequent clause provides that if she marries after his decease, she shall take but one-third of such residue, she does not take an absolute title to the residue, but takes two-thirds thereof upon a conditional limitation, by which, upon her subsequent marriage, that part of the estate becomes ipso facto intestate, without re-entry or other act by the heirs of the testator.

WILLS—CONSTRUCTION—CONDITION AGAINST MARRIAGE.—If a testator, by one clause of his will, gives the residue of his property to his wife, and in a subsequent clause provides that if she marries after his decease she shall take but one-third of such residue, such limitation is not void as in terrorem and as placing a restraint upon marriage.

WILLS—CONSTRUCTION—GIFT IN LIEU OF DOWER.—If a testator, by one clause of his will, gives the residue of his property, real and personal, to his wife, and provides by a subsequent clause in the will that if she remarries she shall have only one-third of such residue, upon her remarriage two-thirds of such residue becomes intestate estate, and the gift of one-third thereof is in lieu of dower, which estops her from claiming dower in such intestate residue, but she is entitled, under the statute of distributions to one-third of the intestate personalty.

Action to determine the construction of the following will of L. H. Hooker, deceased:

"I, Lothrop H. Hooker, of Mansfield, county of Tolland and state of Connecticut, being of sound mind and memory, do make and ordain this my last will and testament in manner and form as follows, viz:

"1st Item. It is my will that all my just debts, funeral charges, and expenses of erecting suitable monuments, be paid and discharged by my executor hereinafter mentioned.

"Item 2d. I give and bequeath to my daughters, Jennie L. Bacon, wife of Joseph H. Bacon, to Mary Eva Biles, wife of George S. Biles, to Emma A. Hooker and Adele M. Hooker, each one hundred dollars for their own separate use.

"Item 3d. I give, bequeath, and devise to my beloved wife, Susan M. Hooker, all the residue of my personal property and real estate owned by me at the time of my decease for her own separate use and behoof.

"Item 4th. It is my will that if the said Susan M. Hooker again marries after my decease, I give, bequeath, and devise to her, the said Susan M. Hooker, one-third of my real estate and personal property for herself and her heirs.

"Item 5. I hereby appoint Origen Bennett the executor of this my will and testament.

"In witness whereof I have signed, sealed, and published and declared this instrument as my will at Mansfield, Conn., on this twenty-eighth day of December, A. D. 1882.

"LOTHROP H. HOOKER. [Seal]

S. B. Harvey, for the executor.

E. B. Sumner and H. Clark, for the testator's widow.

C. E. Searls and W. A. King, for the testator's children.

²⁸⁰ HALL, J. The only claim made by Susan M. Griggs (formerly Susan M. Hooker) to the estate in question, in her ²⁹⁰ written statement filed in the superior court in obedience to an order of that court is, that as widow and as devisee and legatee under the will she has an absolute title to all the real and personal property of the estate after the payment of claims and of the legacies given to the daughters.

The third clause of the will, considered independently of the other provisions, gives to the widow such absolute title to the residuum. But the several clauses of the will must be construed in relation to each other; and reading the third and fourth clauses together, it is clear that the fee to two-thirds of the residue is a gift *durante viduitate*. Upon the fee to such two-thirds the fourth clause imposes a conditional limitation, by which, upon the subsequent marriage of the widow, the estate determines *ipso facto*, without any re-entry or other act by the heirs of the testator: 2 Washburn on Real Property, 4th ed., 24; Phillips v. Medbury, 7 Conn. 568, 573; Sheldon v. Rose, 41 Conn. 371. Such a limitation is not void as in *terrorem* and as placing a restraint upon marriage: Jarman on Wills, 6th Am. ed., *885, 886, and note; Phillips v. Medbury, 7 Conn. 568.

The provisions for the widow by the third and fourth clauses of the will were in lieu of dower. The intention of a testator that a provision of his will for the benefit of his widow shall be a substitute for her dower right need not be expressly stated in the will. No technical words or terms are required to express such intention. Where such a provision is not expressly stated in the will to be in lieu of dower, the intention may be gathered from a consideration of the entire will; but it should be "demonstrated by clear and manifest implication." And unless such intention clearly appears from the will the widow is not put

to her election: 2 Scribner on Dower, 2d ed., 443; *Lord v. Lord*, 23 Conn. 327; *Alling v. Chatfield*, 42 Conn. 276.

In *Lord v. Lord*, 23 Conn. 327, the devise to the wife was not expressed to be in lieu of dower. The testator gave to his wife during her widowhood the use of his dwelling-house, garden, and lot adjoining, one-half the use of his fishery, the use of one-half of his household furniture, the income from ³⁰¹ certain bank stock, and charged upon his farm the annual payment of certain products and gave her certain bank stock. The provision was held to be in lieu of dower. In *Evans' Appeal*, 51 Conn. 435, 440, a gift to the widow of the life use of the entire estate of the testator was held to be necessarily in lieu of dower. In *Anthony v. Anthony*, 55 Conn. 256, a gift to the wife of about two-thirds of the income of the personal property and the use of nearly half the real estate was held to exclude dower, though not expressly stated in the will to be in lieu of dower.

In the case at bar, the testator gave to his wife during widowhood the fee to about nine-tenths of his entire property, and in the event of her remarriage an interest in his estate much greater in value than her dower right. We think it clearly appears from the entire will to have been the intention of the testator that the gift to the widow should be in lieu of dower, and that by her acceptance and enjoyment, for nearly ten years without claiming dower, of the benefit of a provision giving to her the fee of the residuum during widowhood, and thus placing it within her power to enjoy that estate during her life, and giving to her one-third of the residuum absolutely in case of her remarriage, she is estopped from claiming dower in the estate which has become intestate by her marriage.

Is the widow entitled to share in the personal property of the intestate estate under the statute of distribution? Some expressions in the opinion in *Leake v. Watson*, 60 Conn. 498, 513, would seem to indicate that she was not. But the question was not really involved in the decision of that case, and the statement in the opinion that the widow was not entitled to share in the intestate estate "resulting from the failure of the remainders over to the heirs of the daughters," is based upon the peculiar circumstances of the case, among which were the facts that the testator did not contemplate that any part of his estate would become intestate, and that the widow did not claim the right to share in the intestate estate. In *Huntington's Appeal*, 30 Conn. 526, it was made a *quaere* whether the will containing ³⁰² a provision for the benefit of the widow could be considered as affect-

ing the rights of her heirs under the statute of distribution, to share in intestate estate. The case of *Sheldon v. Rose*, 41 Conn. 371, was quite similar to the present case. There the testator bequeathed to his wife the use of all his estate so long as she remained his widow, and in case of her marriage the life use of one-half of his property, the other half to brothers and sisters, but with no disposition of the remainder after the termination of the widow's life estate. The widow remarried. After her death it was held that one-half the intestate estate should be distributed to the heirs of the widow. In *Evans' Appeal*, 51 Conn. 435, the testator having no children gave to his widow the life use of his entire estate after the payment of debts, without an express statement that it was in lieu of dower. The widow declined in writing to accept the provision of the will, upon advice that her acceptance of it would not only bar her dower right, but also her right under the statute of distribution. This court held that she might revoke her election and claim under the will the use of the entire estate for life, and under the statute of distribution one-half the personal estate absolutely; and that notwithstanding her acceptance of the provision of the will, which was held to be in lieu of dower, she was entitled as distributee under the statute to one-half the personal property absolutely. In the recent case of *Nelson v. Pomeroy*, 64 Conn. 257, 262, it was held that the acceptance of the bequest to the widow, which was expressed to be in lieu of dower, did not bar her from claiming her share of the intestate personal estate under the statute. In giving the opinion of the court Judge Hamersley says: "*Pinkney v. Pinkney*, 1 Brad. 376, seems to support the broad rule that a bequest to a widow 'in lieu of all right she may have in my real or personal estate, except as hereinafter mentioned,' does not exclude the widow from her distributive share of any property undisposed of by the will. Doubtless such a statement should be taken subject to the modification that a bequest to his wife in lieu of all claim on the testator's estate may be so framed that if she elect to ³⁸³ take the bequest she will be estopped from claiming any share even of intestate property."

The widow's right to share in the personal property, unlike her right of dower, could have been defeated by the testator by a disposal of his entire estate by will. As it appears upon the face of the will that in the event of the marriage of the widow a part of the estate would become intestate, we think she may justly claim that she accepted the gift to her as a substitute for her

right of dower only, and not in lieu of her statutory right to share in the intestate personal estate.

The superior court is advised: 1. That by the provisions of the will the testator's widow did not become entitled to an absolute estate in fee in either the entire real or personal estate; 2. That upon the remarriage of the widow two-thirds of the entire estate became intestate; 3. That the widow is not entitled to any part of the real estate of said intestate estate, but is entitled as a distributee under the statute to one-third of the personal intestate estate.

Upon the question asked in the amendment to the complaint we give no advice, as it is not involved in the construction of the will.

In this opinion the other judges concurred.

WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE—ESTATE DEVISED.—There is a distinction between conditions in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given. A devise of his home to the testator's daughter for her natural life, unless she shall be married, in which case her life estate shall cease, if the apparent purpose of the will is not to restrain her from marriage, but merely to give her the use of a house until, from her marriage, she will probably have a home otherwise provided for her, is not against public policy, and on the marriage of the daughter, her life estate terminates: *Mann v. Jackson*, 84 Me. 400; 30 Am. St. Rep. 358. A devise upon a limitation is not regarded as a devise in restraint of marriage, and is not therefore invalid: *Extended note to Holtz's Estate*, 80 Am. Dec. 493. Conditions in restraint of the marriage of the widow of the testator have been held to be good and valid: See monographic note to *Coppage v. Alexander*, 88 Am. Dec. 158, on devises and conditions in restraint of marriage.

STATE v. KALLAHER.

[70 CONNECTICUT, 393.]

LARCENY—WHAT CONSTITUTES—TAKING BY FEAR INDUCED BY THREATS.—To constitute larceny, the taking must be not only felonious, but without the consent of the owner; but a felonious taking with the consent of the owner, when the giving of such consent is not a voluntary act, but is the result of actual fear induced by threats calculated to excite a reasonable apprehension of bodily injury, is a taking without the owner's consent and a larceny, and whether such apprehension of danger existed, and, if so, whether it was a reasonable apprehension, are questions of fact, and must be determined in each particular case, by the language of the menaces of the accused, his actions, and the circumstances surrounding the person who thus parts with his property.

LARCENY—EVIDENCE OF FEAR INDUCED BY THREATS.—In a prosecution for larceny, evidence that the accused

threatened to burn a dwelling-house with its inmates unless the owner thereof immediately complied with his demand for money, is admissible as tending to show that such owner parted with his money under a reasonable fear, induced by such threats of immediate bodily injury to himself and his family.

LARCENY—EVIDENCE OF THREATS.—Threats by a person accused of larceny to bring a civil suit against a house owner and attach all of his property, uttered in connection with a threat to burn his house with its inmates, are admissible in connection with and as introductory to such other threat, although they are not by themselves a ground for a charge of larceny.

LARCENY—INTENT—INSTRUCTIONS.—If the possession of the property of another, to which the taker has no claim, is obtained openly, but by deception, artifice, or fraud designed by the taker to secure the possession of such property which is subsequently converted to the use of such taker, the jury is justified in finding that the taking was with a felonious intent, and that larceny was committed, if that and the other facts in the case are sufficient to constitute the crime, and an instruction to that effect is proper.

LARCENY.—INSTRUCTIONS. in a prosecution for larceny, that the crime of larceny is included in the crime of robbery, but that, in the opinion of the court, the proof in the case at bar would not admit of a conviction for robbery, though irrelevant and erroneous, are not ground for reversal unless prejudicial to the accused.

Indictment for larceny, and conviction under the third count charging the accused with the theft, on the 8th of March, 1897, of eight hundred dollars from G. O. Munson. In June, 1896, Munson employed the accused as a farmhand, and he continued in such employment until February 21, 1897, when he was discharged for intemperance. In August, 1896, the parties had some talk about going into the chicken business together, but never arrived at any agreement. When the accused was discharged, he claimed that Munson owed him two hundred dollars, and he threatened to have everything that Munson owned attached unless he was paid, and Munson, although he owed the accused nothing in fact, induced by such threat, paid the accused the amount demanded as settlement in full of all demands. This payment was made February 23, 1897, and on March 3, 1897, the accused returned and claimed that Munson owed him an additional eight hundred dollars, because of his failure to go into the chicken business. The accused then threatened that unless he was paid this additional amount, he would cause all of Munson's property to be attached and taken from him, and his house to be burned and destroyed, together with its inmates. The accused again returned and repeated these threats in the night-time of March 11, 1897. Induced by such threats Munson paid the accused eight hundred dollars. The latter was indicted for larceny in thus obtaining this money, and after a trial and conviction appealed.

R. S. Baldwin, E. J. Maher, and M. Conlon, for the appellant.

W. H. Williams, state's attorney, and A. N. Wheeler, for the state.

⁴⁰⁷ HALL, J. The only objection to the admissibility of the evidence offered by the state in proof of the threats of the accused to burn the house of the Munsons, which seems to be urged by counsel for the accused in their brief submitted to us, is that it should not have been received "unless the threat to burn was expected to be carried out immediately." The record shows that evidence was offered by the state to prove that these threats, made by the accused when he was somewhat intoxicated, to Mr. and Mrs. Munson in their own house between 9 and 12 o'clock at night, when both they and their children were ill, Mrs. Munson being too ill to leave the house, were that if they did not pay over the money to him immediately he would burn and destroy their house, and that there would be no one left to tell the tale, and that he meant to burn them up in it; that he refused to consent to any delay, but insisted that he must have the money then, that night; and that finally Mr. Munson, through fear that the accused would burn and destroy life as he had threatened, paid him the eight hundred dollars.

To constitute the crime of larceny, the taking must not only be felonious, but without the consent of the owner. But a felonious taking with the consent of the owner, when the giving of such consent is not a voluntary act, but is the result of actual fear induced by threats calculated to excite a reasonable apprehension of bodily injury, is, in the eye of the law, a taking without the owner's consent: 1. Wharton's Criminal Law, secs. 850, 851, 852 and note 5; 2 Bishop on Criminal Law, sec. 1169; 2 Greenleaf on Evidence, 13th ed., 193. Whether such apprehension of danger existed, and, if so, whether it was a reasonable apprehension, are questions of fact, and must be determined in each particular case by the language of the menaces of the accused, his actions, and the circumstances surrounding the person who thus parts with his property: *Morris v. Platt*, 32 Conn. 75-83. Clearly, the evidence offered by the state of the threats made by the ⁴⁰⁸ accused in the present case tended to prove that Munson parted with his eight hundred dollars because of a reasonable fear of immediate injury to himself and to his family. It was for that reason admissible. The jury were instructed by the court that if the fear was not that the threats to do great

bodily injury to the Munsons would be speedily or immediately executed, the accused should be acquitted.

The threat of the accused that he would bring a civil suit and attach all the property of the Munsons was a part of the statement in which he threatened to burn the building and its inmates. It was admissible as a part of that conversation, and is introductory to the proof of a more serious threat. It nowhere appears upon the record that the court held that the obtaining money by threats to commence a civil action and to attach property could constitute larceny. On the contrary, the court distinctly charged the jury that if they found that "Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he [Kallaher], believed in his claim or not, he should be acquitted."

It is claimed by counsel for the accused that the following statement, made by the court in its charge to the jury, was irrelevant and harmful to the defendant: "If the possession of property of another to which the taker has no claim be obtained openly, but by deception, artifice, or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent and the crime of larceny committed."

The court in this part of its charge was instructing the jury how a criminal intent might be proved, and not as to what constituted a taking without the owner's consent. The state was required not only to prove that the accused obtained this money by threats of personal violence, but with a felonious intent which existed at the time of the unlawful ⁴⁰⁰ taking. The language quoted must be read in connection with that which precedes and follows it, and when so read it will be seen that the court was pointing out to the jury that when the taking was without the consent of the owner, the jury would be justified in finding that it was with felonious intent, even though it was not secret, but open, if the accused, without having any claim to the property, had thus openly obtained possession of it by deception, artifice or fraud.

In this case there was no claim that the owner had by deception or fraud been induced to part with the mere possession of the money, independently of the ownership, as was claimed regarding the note in the case of *State v. Fenn*, 41 Conn. 590.

When Munson parted with the eight hundred dollars he did so not because he supposed he was asked to part with the possession of the bills only. He understood fully that the accused demanded not the mere possession of the money, but the money itself.

The portion of the charge complained of, when considered by itself, is open to the criticism that the jury might have understood from this language that if they found that the accused had no just claim to this money, nor an honest belief in the claim which he made to it, and that Munson parted not with the possession only but with the ownership of the eight hundred dollars, because of the false and fraudulent representations of the accused that he had commenced a civil action against Munson and that the papers were in the hands of the sheriff to attach all his property, they might upon those facts not only find a taking with felonious intent, but a taking without the consent of the owner, and convict the accused of the crime of larceny.

But when we regard the entire charge of the court, we think the jury could have placed no such construction upon this language. In the two sentences immediately preceding the one under discussion, the court said to the jury: "If the title to the property as well as the possession of the property be obtained by deception, artifice, or fraud, this will not be larceny, because the owner parted with the title as well as the possession. The crime may be obtaining goods under ⁴¹⁰ false pretenses, but it is not larceny." Again, in its final summary to the jury of the questions of law involved in the case, the court, as has been before observed, said: "If the jury find that Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he believed in his claim or not, he should be acquitted." The court concludes its discussion of the questions of law, by stating upon what facts the jury might convict the accused of larceny, namely, upon proof that Kallaher secured the money "without a right to it and without believing he had a right to it, and by a threat to endanger the lives of the Munsons or to do them great bodily harm, which threats the Munsons believed would be speedily executed, and induced fear on their part, and, under the influence of that fear that the threat would be speedily executed during that night, they paid over the money as charged."

It seems to us clear that no jury of ordinary intelligence could

have understood from the charge of the court that they might convict the accused of larceny upon finding that he obtained the money in question by false and fraudulent representations, and without finding it proved that he made the alleged threat of great bodily injury to the Munsons; and that therefore the accused was not prejudiced by the language of the court in this part of the charge.

The last claim made in the brief of counsel for the accused is, that the court erred in stating to the jury that the crime of larceny was included in the crime of robbery, but that in the opinion of the court the proof in this case would not admit of a conviction of the crime of robbery.

The ground of the defendant's complaint seems to be the remark of the court that the evidence would not warrant a conviction of robbery. The court correctly stated to the jury the elements of the crime of larceny, which was the only charge in the information, and what facts were required to be proved to support a conviction of that offense. The duty of the jury to convict or acquit depended upon the proof or the failure to prove these facts, and not upon the question ⁴¹¹ of whether such facts, if proved, were sufficient to sustain the charge of robbery. That inquiry was irrelevant.

We have only noticed those reasons of appeal which are discussed by counsel for the accused in their brief.

There was no error.

In this opinion the other judges concurred, Baldwin and Hamersley, JJ., with hesitation.

LARCENY—WHAT CONSTITUTES—CONSENT OBTAINED THROUGH INTIMIDATION.—The crime of larceny always includes the taking and conversion of property without the consent of the owner. Hence, there can be no larceny if the owner voluntarily parts with the possession and title of property: *Stewart v. People*, 173 Ill. 464; 64 Am. St. Rep. 133, and note. One who obtains the goods or money of another by some fraudulent trick or artifice, and carries them away, is guilty of larceny; *Note to Commonwealth v. Flynn*, 57 Am. St. Rep. 476. See monographic note to *State v. Holmes*, 57 Am. Dec. 278, 279, on the offense of larceny.

LARCENY—INCLUDED IN CHARGE OF ROBBERY.—Robbery is said to be a compound larceny composed of the crime of larceny from the person, with the aggravation of force, actual or constructive, used in the taking. The indictment for robbery charges a larceny, together with the aggravating matter which makes it in the particular instance robbery. If the aggravating matter is not proved at the trial, the defendant may be convicted of simple robbery: See monographic note to *State v. McCune*, 70 Am. Dec. 178, 179; *Commonwealth v. Shutte*, 130 Pa. St. 272; 17 Am. St. Rep. 773.

NICHOLS v. PECK.

[70 CONNECTICUT, 439.]

WAYS—RIGHTS OF OWNER.—The owner of a right of way may do whatever is reasonably necessary to make it suitable and convenient for his use, but he is not entitled to use another way merely because the entrance to his established way has become useless, owing to a lawful change in the grade of the public highway. His remedy is to lower and alter the level of such entrance and of his way to correspond with the new grade of the highway.

WAYS—NONUSER—IMPLIED LICENSE.—The right of passage through a certain barway, as part of a right of way gained by prescription, is not lost by a failure to use it for eleven years after it becomes impassable by act of the public authorities, and the use of another barway, some distance removed, under an implied license from the owner.

WAYS—REVOCATION OF IMPLIED LICENSE.—Changing and locking a gate is a sufficient revocation of an implied license to use it arising from the owner's acquiescence for eleven years in its use by one who has a right of way across the premises at another point.

WAYS—DEVIATION BY PAROL.—A way by prescription, which runs in a defined course to a fixed point, is no more subject to deviation by a parol agreement or by acts and conduct than if it had been created and so described by deed.

WAYS—DEVIATION.—A way joining a highway through a certain gate cannot be regarded in law as substantially identical with a way joining it through another gate seventy feet distant.

APPELLATE PRACTICE.—A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject to review on proceedings in error.

WAYS—EVIDENCE—ESTOPPEL.—An answer in the negative by one when asked if he has "a regular right of way" over land, without being informed of the purpose of the inquiry, and with no intention of misleading a purchaser, does not thereby estop him from claiming that he has a right of way over the land gained by prescription, as against such purchaser of the land who has not relied upon such statement.

C. J. Danaher, for the appellant.

C. H. Sawyer, for the appellee.

⁴⁴¹ **BALDWIN, J.** In 1885 the defendant Peck had acquired, by an adverse user of forty years, a prescriptive right to a way about forty-three rods in length, over a farm now owned by the plaintiff, between a certain lot called the Jones lot, which was wholly inclosed by that farm and the highway. The way was not defined by any worn track, but had always been traveled in substantially the same course, running from half its length through a narrow swale, and connecting with the highway

through a certain barway. In that year the grade of the highway was so lowered by the town authorities as to make the barway useless, whereupon the then owner of the farm closed it, and opened a new entrance from the highway, by a barway set over seventy feet south of that formerly existing. For seven years thereafter the defendant used the new barway as belonging to his way, adversely, under a claim of right. Then the plaintiff bought the farm, and for four years more Peck continued to use the new barway, with his express approval. At the end of that period the plaintiff chained up and padlocked the gate of the barway, and now sues Peck for breaking the chain in order to get access to his lot.

The owner of land which is subject to a right of way is not bound (unless by virtue of some agreement) to keep the way in repair, or to be at any expense to maintain it in a passable condition. The owner of the right of way may repair it, and do whatever is reasonably necessary to make it suitable and convenient for his use.

When the old barway became useless, it was therefore the right of Peck to lower it and alter the level of his way to correspond with the new grade of the highway: *Smith v. City Council*, 19 Ga. 89; 63 Am. Dec. 298. He preferred to make use of another barway set up by the owner of the farm, over seventy feet distant from the prescriptive bounds of his way; and to this no objection was made for eleven years. When the plaintiff chained up the gate, however, and locked it, he sufficiently manifested his intention that this use should be continued no longer, and effectually revoked any license implied from his previous conduct. *Res ipsa loquitur*: *Foot v. New Haven etc. Co.*, 23 Conn. 214, 223.

⁴⁴² A way by prescription which runs in a defined course to a fixed point, is no more subject to variation by parol agreements or by acts and conduct, than if it had been created and so described by deed.

The finding of the trial court, that the way used from 1885 to 1896 was substantially the same as that used from 1845 to 1885, is an inference from facts which do not warrant it. The law cannot regard a way joining a highway through a certain gate, as substantially identical with a way joining it through another gate seventy feet distant. A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in error: *Winsted Hosiery Co. v. New Brit-*

ain Knitting Co., 69 Conn. 565, 575; Nolan v. New York etc. R. R. Co., 70 Conn. 159.

The right of way which existed in 1885 exists still. The disuse of the part which followed the change of the grade of the highway arose from circumstances which exclude any inference of an intent to abandon that part, unless, by exchanging it for another way, the right to which should be equally secure. Such an abandonment might have been presumed if Watrous, who owned the farm in 1885, had then given Peck a deed of the right to use the new barway; or had Peck's user been continued, adversely, and under a claim of right, for fifteen years. But so long as it had no other justification than an implied license, or or acquiescence for a shorter term, it could not avail to extinguish his original prescriptive right. Different rules might apply where one location of a highway is abandoned for another, substituted for it by acts of dedication, since a dedication once accepted is irrevocable: Jones on Easements, sec. 429.

The defendant's remedy, when he found the gate chained against him, was to have recourse to the way he owned, and cut it down, at the point where the old barway was, to the grade of the highway: Reignolds v. Edwards, Willes, 282.

The entrance from the old barway became impassable by the lawful act of the public authorities. The owner of the farm only closed it after it had thus become useless. Had ⁴⁴³ he, without such cause, wrongfully closed it, in order to prevent its lawful use by Peck, and then allowed him for eleven years to pass through the new barway, it may be that in such case the latter could not have been excluded from that mode of access to his way, unless reasonable notice of the intended revocation of license had been previously given: Hamilton v. White, 5 N. Y. 9. But as things stood, the defendants were guilty of a technical trespass in forcing their way through.

With respect to the claim of estoppel, it is found by the trial court that before the plaintiff bought from Watrous they asked Peck if he had "a regular right of way" over the farm, to which he replied in the negative; but that he was not informed of the purpose of the inquiry, and answered it with no intention of misleading; nor did it appear that the plaintiff relied upon the statement in completing his purchase. The question being, not whether he had a right of way, but whether he had a regular one, was calculated to direct his attention only to the particular description of his right, and he might well have thought that a way acquired by adverse user was not entitled to the name of "regu-

lar. No estoppel can be founded on his reply: *Danforth v. Adams*, 29 Conn. 107.

We perceive no reason for bringing separate suits against the Hutchinsons. If the plaintiff desired to establish his title against them also, he should have joined them as codefendants with Peck. The three suits will be treated as consolidated in this court, and costs taxed in favor of the appellant in one, only.

There is error in the judgment appealed from.

In this opinion the other judges concurred.

PRIVATE WAYS—USE OF.—The use of a way is to be confined strictly to purposes for which it was granted, reserved, or prescribed. The owner of a way may repair it, or put it into a condition to be used, and, indeed, except there be an agreement to the contrary, he is bound to keep it in repair. Therefore, he has no right to go outside of the limits of a defined and designated private way, in passing from one point to another, although the way is impassable by reason of its being overflowed or out of repair: See monographic note to *Bakeman v. Talbot*, 88 Am. Dec. 280, 281.

PRIVATE WAYS—REVOCATION OR EXTINGUISHMENT.—An actual obstruction of a private right of way, as by inclosing and cultivating it for ten years, extinguishes the plaintiff's right thereto: *Bowen v. Team*, 6 Rich. 298; 60 Am. Dec. 127; but the obstruction of a way by the erection of a gate thereon, which may be opened and shut at pleasure, is not such an obstruction as will operate to extinguish the claimant's right of way, however long it may have been continued: *Barnwell v. Magrath*, 1 McMull. 174; 38 Am. Dec. 254, and note. A right of way may be extinguished by nonuser: *Webber v. Chapman*, 42 N. H. 326; 80 Am. Dec. 111, and note; but omitting to remove an obstruction in a way, placed there by the defendant, is not an abandonment thereof; otherwise had the plaintiff himself erected the obstruction: *Rogers v. Stewart*, 5 Vt. 215; 28 Am. Dec. 296. See *Phillips v. Dressler*, 122 Ind. 414; 17 Am. St. Rep. 375; *Johnson v. Borson*, 77 Wis. 593; 20 Am. St. Rep. 146; monographic note to *Welch v. Wilcox*, 100 Am. Dec. 114-119.

ESTOPPEL—CONDUCT OR STATEMENTS of a party do not operate as an estoppel in favor of another party who was not influenced by them and would not suffer injury if there was a contradiction of them: *Boylston v. Rankin*, 114 Ala. 408; 62 Am. St. Rep. 111, and note. Representation procured by fraud does not ordinarily create any estoppel, nor prevent the person making it from proving how it came to be made, and that it is not true: *McCaskill v. Connecticut Sav. Bank*, 60 Conn. 800; 25 Am. St. Rep. 823, and note.

STATE v. HARBOURNE.

[70 CONNECTICUT, 484.]

GAMING—STATUTE PROHIBITING—INTERSTATE COMMERCE.—A statute prohibiting all persons from engaging in the business of transmitting money to any racetrack or other place, to be there bet on any horserace, trial of speed, skill, or endurance, et cetera, whether within or without the state, and also from keeping any place in which such business is permitted or carried on, is valid and not unconstitutional as a regulation of interstate commerce as applied to the agent of a telegraph company who is engaged in such business, and transmits money to another state by telegraph to be there bet upon the result of horseraces.

GAMING—STATUTE PROHIBITING—VIOLATION OF BY TELEGRAPH COMPANY.—Under a statute prohibiting all persons from engaging in the business of transmitting money to any race-track or other place, to be there bet upon any horserace, et cetera, whether within or without the state, it is not necessary to a violation of such statute by a telegraph company that its business should relate exclusively to the transmission of money for betting purposes. It is sufficient if it engages in such business, although as an independent branch, and although its other business is legitimate telegraphing.

GAMING—VIOLATION OF STATUTE PROHIBITING—EVIDENCE.—A single transmission of money by a telegraph company for betting purposes does not constitute carrying on a business, but evidence of it is admissible in connection with other evidence to show the violation of a statute prohibiting such business.

C. E. Perkins and M. J. Keneally, for the appellant.

N. R. Bronson, prosecuting attorney, for the appellee.

486 Hall, J. The act creating the offenses charged is directed against that form of gambling known as pool selling, including bets or wagers on the result of any trial of speed, skill or endurance: Pub. Acts 1893, p. 240. It prohibits: 1. Keeping any place with apparatus or devices for the purpose of carrying on such gambling; 2. Keeping any place where pool-selling of any kind, either directly or indirectly is permitted or carried on; 3. Keeping any place in which the business of transmitting money to any racetrack or other place, there to be placed or bet on any horserace, et cetera, whether within or without this state, is permitted or carried on; 4. Making any such wager or buying or selling any such pools; 5. Being concerned in buying or selling any such pools; 6. Being concerned in carrying on the business of the transmission of money to any racetrack, et cetera.

The defendant is charged in the first count with a violation of the third prohibition, and in the second count with a violation of the sixth. The defense relies on the alleged unconstitutionality of the act.

⁴⁸⁷ On the trial of the case to the jury, upon the plea of not guilty, "the state claimed and offered evidence to prove, that on the twenty-eighth day of January, 1897, the defendant, in the city of Waterbury, was employed by the New Jersey News and Electric Telegraph Company, as the manager of its telegraph office there located; that as such manager he received from one ——— a telegraphic message in the ordinary form used for transmitting messages, addressed to the Jersey City Commission Company, Jersey City, New Jersey, directing the said Jersey City Commission Company there to bet for the sender of said message the sum of money named therein, and to draw upon Mills & Co., New York City, New York, for said money; that at the time of delivery of said message to the defendant the said ——— deposited with the defendant said sum of money to be by him transmitted by telegraph to Mills & Co., New York City, subject to the draft of the said Jersey City Commission Company, and that said telegraph message was by the defendant transmitted by telegraph to the Jersey City Commission Company, and said money was by the defendant transmitted by telegraph to Mills & Co., and that the defendant knew that the purpose in said transmissions was to have said money bet upon a horserace without this state. The state offered evidence of no other violation of the law.

"The defendant claimed and offered evidence to prove and claimed he had proven, that in the receipt of said message and of said money he was acting as the agent of his said employer in the ordinary course of business of a telegraph company engaged in the business of telegrapher of messages and moneys. The defendant admitted that he knew the purpose for which said money was sent and said message transmitted."

The defendant in writing requested the court to charge the jury as follows: "1. That if the jury shall find that the accused, as charged in the first count of the complaint of the prosecuting attorney, did possess, keep, manage, maintain, and occupy a certain room, office, and place in which the business of transmitting money to a certain racetrack ⁴⁸⁸ or racetracks, or other places without this state, there to be placed or bet on certain horseraces, games, and competitions, with full knowledge thereof, and that said keeping, possessing, managing, maintaining, and occupying was in the ordinary course of the business of a telegraph company, he is guilty of no offense against the laws of this state, as any statute of this state prohibiting such acts would be and is in violation of and against the provisions of the constitution of the

United States, vesting in the Congress of the United States the power of regulating commerce between the states; 2. That if the jury shall find that the accused did in fact, as charged in the second count of said complaint, transmit (by telegraph) money from the city of Waterbury to a place without this state for the purposes alleged in this complaint, and that said transmission was in the ordinary course of the business of a telegraph company, he is not guilty of any offense against the laws of the state, and that a statute of this state which prohibits such act is void, being contrary to said provision of the constitution of the United States."

The court refused to so charge the jury, but did charge the jury as follows: "That notwithstanding the jury should find that in the keeping, et cetera, of the place as set forth in the complaint, the accused kept said place for the ordinary purposes of a telegraphic business, yet if the business of transmitting money for the purposes charged in the complaint was carried on in said place, the accused was guilty of a violation of the laws of this state, and the statute prohibiting such act was constitutional; and that if the jury should find that accused did, as charged in the second count of said complaint, knowingly transmit (by telegraph) moneys from the city of Waterbury to a place without this state to be bet upon a horserace, that the accused is guilty of a violation of the laws of this state, notwithstanding such transmission may have been in the ordinary course of the business of a telegraph company, and that the statute of this state prohibitive of such act is constitutional." To the court's refusal to charge as requested, and to the charge as delivered, the defendant duly excepted.

⁴⁸⁹ The case was submitted in this court on briefs. In that of the state, it is stated that "the facts are not disputed, nor is it denied that the statute concerning poolselling distinctly prohibits the act done by the accused. He claimed, however, that the law was unconstitutional. No other line of defense was adopted, and no evidence put in to confuse the issue." The brief filed by the defendant in reply commences thus: "It appears from the brief of counsel for the state that the only question in this case is that of the constitutionality of the act of 1893, page 240, of the Public Acts of that year. He also admits that the act would be invalid as a restraint on interstate commerce, if it cannot be brought within the limits of the police power of the state. This limits the question to the precise point as to whether, under any claim of police power, the state can

interfere with messages sent from one state to another, because the legislature thinks that the matters concerning which the messages are sent are such as it does not approve of."

We shall dispose of the appeal on the question to which the counsel on both sides have thus addressed themselves, and which they seem to agree in regarding as the only one presented on the record; assuming that the attention of the jury was properly directed by evidence and instructions, to which it was thought unnecessary to refer in the finding, to the necessity of proof, under the second count, that the defendant, at the time of transmitting the money to be bet, was unlawfully concerned in the carrying on of the business of the transmission of money to places without the state, there to be placed or bet.

The decisions in respect to the power of Congress to regulate commerce among the several states, which is granted by the constitution, have been numerous and not altogether consistent; but they seem to have established the following propositions: A state law dealing directly and only with interstate commerce is void; a state law purporting to deal with domestic matters, but being in its effect and essence merely a regulation of interstate commerce, is void; a state law plainly and in good faith dealing only with state matters ⁴⁹⁰ is valid, notwithstanding it may incidentally affect interstate commerce, unless it comes in conflict with some valid statute of the United States on that subject, or, in the absence of legislation, affects such commerce in a particular where the silence of Congress is equivalent to legislative prohibition.

The power of regulating commerce covers such a wide field that cases must arise where a law passed in the legitimate exercise of the power of domestic legislation is also, in a sense, a regulation of commerce; but it is not therefore necessarily an invasion of the jurisdiction of Congress, i. e., an exercise of the "power" of regulation; it is an exercise of the "power" of domestic legislation, and is valid unless it conflict with some existing law, or so essentially affects interstate commerce as substantially to disturb those channels of commerce which Congress has seen fit to leave undisturbed. In dealing with such legislation the courts have given a much wider latitude to what is called police legislation than to other forms of domestic legislation; because police regulations are absolutely essential to the protection of society, and in the main can only be established by the state government.

The law in question is purely a police regulation. For more

than two hundred years we have treated wagering as against public policy, and playing at the games which promote wagering has been illegal. The restrictions on playing the games have been removed, but playing for anything of value is still an offense: Gen. Stats., secs. 2557, 2558. A wager of any kind is illegal; the loser can recover the money lost, and if he does not sue, any person may sue for and recover treble the amount: Gen. Stats., sec. 2552, 2553 (passed in 1797, Stats. 1808, p. 361.) Betting on horseraces is a penal offense: Gen. Stats., sec. 2556. Since the establishment of our government wagering has been held to be, if not absolutely immoral, yet so injurious in its results as to require suppression by penal legislation. Such legislation has for many years past been directed against the business of promoting wagering in its various ⁴⁹¹ forms; and the keeping of places where such business is carried on has been treated as an offense. Indeed, throughout the United States the business of gambling is now recognized as illegitimate, and one whose contracts the courts will, in many cases, refuse to enforce. Within the past two years the United States supreme court has said: "This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous, when placed in contrast with the widespread pestilence of lotteries": *Douglas v. Kentucky*, 168 U. S. 488, 496. Similar language may appropriately be used in respect to the poolselling against which the act in question is directed; especially since the perversion of the telegraph to its uses has multiplied many fold its capacity for harm.

The act of 1893 attempts to reach the root of the evil by prohibiting the keeping of a place in which this kind of gambling in any of its ramifications is carried on. One of the most dangerous forms is that for which the telegraph is utilized. In prohibiting the keeping of a place in which such a business is carried on, or being concerned in such a business, the state does not attempt to and does not in fact exercise any exclusive power vested in Congress over interstate commerce; it simply prohibits in this state the business of aiding crime, and if such commerce is thereby affected at all, it is the incidental effect of depriving those here engaged in telegraphing of the profits they might make through the business of promoting gambling in this state. That business is prohibited; and it is immaterial whether it be carried on by an individual in his own house, or by a telegraph company apart from, or as a part of, its ordinary business of telegraphing. In whatever place and by whomsoever

the business of promoting gambling is carried on, the offense is committed; and cannot be justified because in committing it a telegram is sent from Connecticut to New Jersey. In *Plumley v. Massachusetts*, 155 U. S. 461, it was claimed that the power of regulating interstate commerce involved the right in all citizens to introduce and sell in any state any harmless article of food, unrestricted by state legislation; ⁴⁹² but it was held that a police regulation forbidding the sale in such manner as was likely to induce the citizens of Massachusetts to buy one article under the belief they were buying another, was not a restriction of interstate commerce. The court said (page 479): "The constitution of the United States does not secure to anyone the privilege of defrauding the public." No more does it secure to anyone the privilege of promoting gambling. The same principle, i. e., that a police regulation pure and simple does not become a regulation of interstate commerce, merely because it may incidentally affect the bringing into the state or sending out, of certain articles of commerce, was affirmed in *Geer v. Connecticut*, 161 U. S. 519, 534. But when a state attempts to regulate domestic commerce in an article which it recognizes as a legitimate subject of commerce, so as to discriminate in favor of domestic commerce, and against interstate commerce in that article, the law ceases to be a pure police regulation and becomes a direct interference with interstate commerce: *Scott v. Donald*, 165 U. S. 58. The law before us is not analogous to the South Carolina dispensary law, condemned in *Scott v. Donald*, 165 U. S. 58. There might be some analogy if the legislature had recognized gambling by telegraph as a legitimate subject of commerce, and had undertaken to authorize the business of transmitting money for the purpose of gambling when the transmission was to places within the state, and to forbid or to regulate it when the transmission was to places without the state. The law comes within the principle illustrated by the cases of *Plumley v. Massachusetts*, 155 U. S. 461; *Geer v. Connecticut*, 161 U. S. 519, and *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613, as well as by many other cases unnecessary to cite. It is closely analogous so far as the principle involved is concerned, to the Georgia law forbidding the running of railway trains on Sunday, which was sustained, although the channels of interstate commerce were thereby blocked for one day out of every seven. The language of the court in announcing the decision is applicable to the present case, and would seem to be conclusive. After re-

viewing various prior decisions, the court, speaking by Mr. Justice Harlan, ⁴⁹³ says: "These authorities make it clear that the legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the constitution. Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight": *Hennington v. Georgia*, 163 U. S. 299, 317.

In the case at bar, the defendant's sole claim was, that if he kept the place as charged and was concerned in the business as charged, yet inasmuch as some of the acts essential to constitute these offenses consisted in the transmission of the information and money to another state, he was guilty of no offense, because a law restricting the ordinary business of telegraphing among the states is void; and his sole grievance is that the court did not so charge. For the reasons given, we think the charge on that point is correct. When one opens an office and makes arrangements and furnishes facilities to enable his customers to sit in his office and gamble ⁴⁹⁴ upon the results of horseraces in this state and other states, he keeps a place in which the business forbidden by the statute is carried on; and if he knowingly assists in the transmission of money in the course of that business, he is concerned in the business. It is immaterial whether the illegal business is carried on as a wholly

independent business, or as a part of an otherwise legitimate business in telegraphing.

For a telegraph company to transmit a single message, and make a single transfer of funds, such as is stated in the finding of the court in the case before us, would not, standing alone, constitute a carrying on of the business of transmitting money for betting purposes. It would, however, be relevant evidence to show that fact, and might be sufficient, in connection with proof that the company furnished special conveniences for the use of those desiring to make such bets, or had no substantial business of any other description.

There is no error in the judgment of the district court.

In this opinion the other judges concurred.

INTERSTATE COMMERCE—POOL SELLING.—The purchasing and selling in this state of pools on races and games conducted in another state may be prohibited by our laws. Such prohibition is not an unauthorized interference with the power of Congress to regulate commerce, nor is it material that the money to be wagered is forwarded by telegraph to a state where it is not unlawful to make the wager: *Lacey v. Palmer*, 93 Va. 159; 57 Am. St. Rep. 793.

CHANNON v. SANFORD COMPANY.

[70 CONNECTICUT, 573.]

MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE PLACE FOR SERVANT.—The general rule requiring the master to use reasonable care to provide a reasonably safe place for the servant to work in does not apply to those cases of frequent occurrence in which it is the duty of the servant, by force of the nature of his employment, to make the staging, scaffolding, or similar structure upon which he does his work reasonably safe for his own use.

MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE PLACE FOR SERVANT.—The general rule requiring the master to exercise reasonable care to provide for his servant a reasonably safe place in which to do his work is not ordinarily applicable to cases where the master neither has nor assumes possession, use, or control, legal or actual, of the premises or place where the servant may be at work.

MASTER AND SERVANT—DUTY OF MASTER TO FURNISH SAFE PLACE FOR SERVANT ON PREMISES OF ANOTHER.—If a master sends his servant to work upon the premises of a third person at the request of the latter, the master is not liable to the servant for the unsafe condition of such premises, nor is he required to care for the safety of the servant while upon such premises, in the absence of an express agreement to that effect.

Action to recover damages for personal injuries. The plain-

tiff, John Channon, was by occupation an ornamental plasterer, and had been in the employment of the defendant company, manufacturers and placers of plastic ornaments and decorations, for some eight or nine months. While the plaintiff was so employed, the defendant company made to the order of one J. F. Caulfield, a mason and contractor, certain plastic ornaments for a church building then in course of erection. At the request of Caulfield, the defendant sent the plaintiff to the church premises to place such ornaments in position therein. Caulfield agreed to furnish, and did furnish, the staging necessary to put such ornaments in position, but the staging proved defective and insufficient, and it gave way and precipitated the plaintiff to the floor beneath, thereby severely injuring him. He recovered judgment for one thousand dollars, and the defendant appealed.

W. W. Hyde and A. L. Shipman, for the appellant.

T. E. Steele, for the appellee.

⁵⁷⁸ TORRANCE, J. The decisive question in this case is whether, upon the facts found, it was the duty of the defendant to provide the staging upon which the plaintiff was to do his work in the church building. If it was, there is no error; if it was not, there is. In the discussion of this question it will be assumed that the plaintiff, while doing the work in the church, was and remained, as the finding shows, the servant of the defendant; and further, that the staging furnished to the plaintiff was, as claimed by him, a "place" for the servant to work in, rather than a mere tool or appliance, within the meaning of the rule hereinafter referred to.

The general rule requiring the master to use reasonable care to provide a reasonably safe place for the servant to work in, and performance of that requirement as the full measure of his duty in this respect, is well settled in this state: *Wilson v. Wilimantic Linen Co.*, 50 Conn. 433; 47 Am. Rep. 653; *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181. This was the rule applied in this case in the trial court, and the important question is whether it was applicable under the facts found.

The first part of the rule above referred to is usually stated as follows: "It is the master's duty to exercise reasonable care to provide for his servant a reasonably safe ⁵⁷⁹ place in which to work": *McElligott v. Randolph*, 61 Conn. 157, 161; 29 Am. St. Rep. 181. This, as a general statement of the general rule

applicable in most of the cases of this kind, is accurate enough. It is sufficiently accurate as applied to cases like the two hereinbefore cited from our own reports. As thus stated, however, the duty, and the liability arising from a negligent failure to perform it, would appear to rest upon the master at all times and under all circumstances, whenever and wherever his servants may be at work for him; but this clearly is not so. There are cases where the servant may be at work for the master, and yet no such duty or liability rests upon the master. In cases where the servant does his work upon staging, scaffolding, or similar structures, it frequently happens that it is the duty of the servant, by force of his employment, to make such structure reasonably safe for his own use. In such cases the general rule does not apply in favor of such servant: *Shearman & Redfield on Negligence*, 5th ed., sec. 195, and cases cited; *McGorty v. Southern New Eng. Tel. Co.*, 69 Conn. 635; 61 Am. St. Rep. 62.

Then, again, this general rule is not ordinarily applicable to cases where the master neither has nor assumes possession, use, or control, legal or actual, of the premises or "place" where the servant may be at work. The general rule is based upon such possession, use, and control by the master of the premises where he puts his servants at work for him; and, speaking generally, his duty to use due care to make and keep such place reasonably safe flows from and is measured by such possession, use and control. Just as the master's liability for the acts of his servants while engaged in his business is based upon his power to control them, so his duty to provide reasonably safe premises is founded essentially upon his occupation, use, and control of such premises. This being the reason of the rule, when the reason does not exist the rule is inapplicable.

If an employer sends his servant to a distant place by rail, to do a piece of work on the premises of B, it would hardly be contended, in the absence of a special agreement to that effect, that the master would be responsible to the servant ⁵⁸⁰ for the negligence of the transportation company in failing to carry the servant safely, or for the negligence of B in failing to keep his premises in a reasonably safe condition. In the case supposed, the servant, both while being carried and while at work on B's premises, is at work for his master, and the railroad car and the premises of B are places where he is directed to and does perform work for his master; and yet the master, as master merely, would be under no duty to use reasonable care to make such

places reasonably safe. The law in such cases reads no such duty into the contract of hiring.

If the master assumes possession and control of the premises of B with his consent, even temporarily, for the purpose of doing the work there, the result might be different. Such a case might be, under certain circumstances, within the reason of the rule. Ordinarily, however, we think the law reads such a duty on the part of the master toward the servant into the contract of hiring, only with reference to premises used, occupied, or controlled by the master. If this were not so the duty and liability of the master would be very burdensome. He would be, in effect, frequently made responsible for the negligence of third parties with reference to premises he had never seen, and about the condition of which he knew and perhaps could know nothing. The merchant would, in effect, be liable to his clerk for the negligence of the customer with respect to the safety of the premises upon which the clerk goes to deliver his master's goods, and the master plumber or carpenter to his workman for the negligence of the householder upon whose premises he sends the workman simply to make some slight repairs. In all such cases the servant, if injured without fault on his part, by the negligent failure of the owner or occupier of the premises to keep them in a reasonably safe condition, has his remedy against such owner or occupier, and, in the absence of some agreement to that effect, has none against the master.

We think the case at bar, upon a proper construction of the finding, falls within this class of cases. Unless it was ⁵⁸¹ the duty of the defendant to furnish the staging in question, the judgment in this case cannot be supported. Such a duty could rest upon the defendant only upon two grounds: 1. Because it had specially assumed it in this case; or 2. Because the law imposed it upon the defendant as master. We think the facts found fail to show either that the defendant specially assumed, or that the law imposed, any such duty.

If the defendant specially assumed any such duty, that was a fact to be found by the trial court, either expressly or by necessary implication. It is not found expressly, nor by necessary implication. The question on this part of the case is, whether, if no such duty rested upon the defendant by law, the facts found warrant the conclusion, as matter of law, that it assumed such a duty. The strongest thing in the finding in favor of such a conclusion is the fact that the defendant assured the plaintiff that the staging would be entirely safe; but

this fact, taken either alone or with the other facts found, clearly does not warrant any such conclusion as matter of law. The assurance was given at the very time that the defendant told the plaintiff about the strong staging that had been already erected and in use in the building, and at the very time when plaintiff was informed that Caulfield and not the defendant was to "see" to the staging. What the defendant said to the plaintiff, as detailed in the finding, falls far short of an agreement to be responsible for the staging already built, or to be built, by Caulfield or his servants. The most that can be said about the finding upon this point is, that it contains evidential facts tending to prove such an agreement; but such facts do not, as matter of law, constitute such an agreement. Taking the finding as a whole, it is quite clear that it does not show that the defendant specially assumed the duty in question. In justice to the trial court we ought to say that its decision is not based upon the ground that the defendant specially assumed any such duty, but upon the ground that such duty was imposed by law upon the defendant as master under the circumstances; and the remaining question is whether this is so.

⁵⁸² The facts clearly show that Caulfield was, before and at the time the plaintiff went to work in the building in the exclusive occupation and control of the building, premises, and staging, and so remained till after the plaintiff's injury. The building was in New Britain; the defendant's place of business was in Hartford, where plaintiff worked for the defendant. The agreement between the defendant and Caulfield was, in effect, that the defendant should furnish a skilled workman to place the ornament, and Caulfield would furnish staging and all else. The plaintiff was not informed of the details of this agreement, but this is of no importance on this part of the case. It was important as evidence bearing upon the question whether the defendant specially assumed the duty to furnish staging, but not upon the question whether the law imposed the duty upon the defendant as master. The defendant sent the plaintiff from Hartford to this church building in New Britain, to perform this work. The defendant had never been in possession or control of the premises, even temporarily, up to the time the plaintiff went there. It never was, upon the facts found, in possession or control of these premises at all, in any such sense as to make it responsible to its servants for their safety. The case then, as disclosed by the record, is simply the ordinary one where a master, without more, sends his servant to work.

upon the premises of B at B's request. In such case, in the absence of agreement to that effect, the law does not impose on the master the duty of caring for the safety of the servant upon B's premises.

There is error in the judgment complained of and the cause is remanded for the assessment of nominal damages.

In this opinion the other judges concurred, except Andrews, C. J., who dissented.

MASTER AND SERVANT—SAFE PLACE TO WORK—DEFECTIVE SCAFFOLDING—LIABILITY OF MASTER.—If a gang of masons are at work upon a building, and the construction of a platform becomes necessary to the prosecution of their work, this is one of the details of the business which is generally left to the workmen themselves, and when the master does not take it out of their hands nor furnish defective materials to be used in it, and it is in fact constructed by the workmen according to their own judgment, and, through some defect in its construction, one of them is subsequently injured, the master or common employer is not answerable: *Kimmer v. Webber*, 151 N. Y. 417; 56 Am. St. Rep. 630. Compare *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520; 62 Am. St. Rep. 393; *Devlin v. Smith*, 89 N. Y. 470; 42 Am. Rep. 311.

STATE v. TRAVELERS' INSURANCE COMPANY.

[70 CONNECTICUT, 500.]

CONSTITUTIONAL LAW—RIGHT TO TAX CORPORATE STOCK OF ALIENS.—A state has the power to tax the corporate stock of a domestic corporation owned by aliens at a higher rate than that owned by resident stockholders.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW.—The provision of the fourteenth amendment to the federal constitution, that no state shall deny to any person within its jurisdiction the equal protection of the laws, applies only to persons physically present within the jurisdiction of the state the protection of whose laws they invoke.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW.—The provision of the federal constitution that all persons within the jurisdiction of the United States shall have the same right in every state to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like taxes, licenses, and exactions of every kind and to none other, does not apply to aliens who are not within the United States.

CONSTITUTIONAL LAW—STATE'S RIGHTS AS TO ALIENS.—A state has the right to debar aliens from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. Aliens may be excluded from membership in domestic corporations, unless they enter them on conditions which subject their investments to such burdens of taxation as the state may think proper to impose.

TAXATION OF CORPORATE STOCK OF NONRESIDENT OWNERS.—A nonresident stockholder in a corporation who remains such after the passage of a law increasing the tax on stock owned by nonresidents at a certain time, must be deemed to have assented to the payment of the increased tax.

TAXATION OF CORPORATE STOCK OF NONRESIDENTS.—A statute requiring corporations to pay to the state an annual tax of a certain per cent upon the market value of their stock owned by nonresidents, although in form a tax against the corporation, is in substance a tax against each nonresident stockholder to be paid by the corporation in his behalf.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TAXATION OF STOCK OWNED BY NONRESIDENTS.—A statute requiring the payment by each corporation whose stock is liable to taxation, and not otherwise taxed, of one and one-half per cent of the value of the stock of nonresident stockholders, is not unconstitutional as depriving the corporation of its property without due process of law, although another statute gives the corporation a lien on such stock for only one per cent of the value of the stock for such payments, when another statute gives the corporation a lien on all the stock owned by any person therein for all debts due to it from him, and still another statute provides that all taxes properly assessed shall become a debt due from the person whose property is taxed.

CONSTITUTIONAL LAW—TAXATION OF CORPORATE STOCK OF NONRESIDENTS.—A statute providing for the payment by each corporation whose stock is liable to taxation, and not otherwise taxed, of a specified per cent of the value of the shares of nonresident stockholders, as taxes, is not unconstitutional as attempting to impose a tax on personal property outside the jurisdiction of the state, as the state has power to give the shares of the corporation a situs within the state for the purpose of taxation.

TAXATION OF CORPORATE STOCK.—The power which creates a corporation can give its capital stock a situs within the state for the purposes of taxation.

TAXATION OF CORPORATE STOCK OF NONRESIDENT OWNERS.—The fact that the property of a corporation which gives value to its stock is taxed does not prevent the imposition of a tax on the stock of nonresidents, under a statute providing for the payment of a tax on shares of nonresident stockholders by each corporation whose stock is liable to taxation and not otherwise taxed.

TAXATION OF CORPORATE STOCK OF ALIEN OWNERS.—A statute providing that the shares of every resident stockholder in specified corporations shall be set in his taxable list in the town where he resides, but that so much of the capital of the corporation as may be invested in real estate on which it pays a tax shall be deducted from the market value of the stock in its returns to the assessors, does not apply to alien stockholders.

TAXATION—CORRECTION OF VALUATION OF CORPORATE STOCK.—An error in the mathematical process by which the valuation of corporate stock owned by nonresidents or aliens is reached for the purpose of taxation may be corrected by the courts, although a statute provides that such valuation, as made by the board of equalization, shall be final.

Action to recover the balance of a tax upon the shares of nonresident stockholders of the defendant company, and tried

upon a demurrer to the complaint, which was overruled, and judgment rendered for the plaintiff. Defendant appealed.

H. C. Robinson and W. R. Matson, for the appellant.

E. D. Robbins, for the appellee.

⁵⁰⁸ BALDWIN, J. Under the laws of this state, some of its corporations are subjected to taxes which are in lieu of any upon their shareholders, while for others a different rule is prescribed, and the shares are taxable against those who own them. General Statutes, section 3916, required the cashier or secretary of each corporation whose stock is liable to taxation and not otherwise taxed to deliver, early in October, annually, to the comptroller, a sworn list of all its stockholders residing without this state on the first day of that month, and the number and market value of the shares held by each, and to pay to the state, on or before the twentieth day of the month, one per cent of such value. Section 3917 provides that all such companies "shall have a lien upon the stock of each nonresident stockholder, for the reimbursement of the sums so required to be paid by them, to the extent of one per cent of the value of his stock as contained in said list."

Returns of a somewhat similar character as to the shares held by residents in Connecticut are to be made to the assessors of the town, city, or borough to which they respectively belong: Gen. Stats., sec. 3837; Pub. Acts 1897, c. 205, p. 905.

In 1897, section 3916 was so amended as to raise the percentage ⁵⁰⁹ of the valuation payable to the state from one to one and one-half per cent: Pub. Acts 1897, c. 153, p. 857. By General Statutes, section 3930, the state board of equalization, at a certain time in October, after due opportunity for a hearing of the party making any return under General Statutes, section 3916, is to correct the return and the valuation given therein, if found erroneous, and the valuation as thus corrected is to be "final, and the sums required shall be paid according to it."

Every Connecticut shareholder in each of these corporations is taxable upon his stock by the municipality in which he may reside, at such rates as it may fix from year to year, in view of its financial needs.

The defendant belongs to the class of corporations whose stock is liable to taxation, and the mode of such taxation is prescribed by the statutes to which reference has been made.

The shares held by residents are taxable at such rates as the towns, cities, and boroughs, to which they belong may, from time to time, see fit to impose, upon a valuation set by the local assessors. The shares held by nonresidents are taxable at the fixed rate of one and one-half per cent upon their market value, as determined by the state board of equalization.

It is nowhere stated upon the record that any of the non-resident shareholders in the defendant company are citizens of the United States or of any one of them. Their names only are given, and while we may take judicial notice that these are those of persons belonging to an English-speaking race, we cannot assume, as a cause for reversing the judgment rendered by the superior court, that they are Americans, any more than that they are Englishmen. The provision of the constitution of the United States that the citizens of each state shall be entitled to all privileges and immunities of citizens in every other must, therefore, be laid out of the case.

Regarding the shareholders in question simply as so many persons residing without this state, there can be no ground for claiming that they cannot be charged with the tax in controversy, ⁶⁰⁰ by reason of the declaration in the fourteenth amendment to the constitution, that no state shall deny to any person within its jurisdiction the equal protection of the laws. This inhibition is only for the benefit of persons who are physically present within the territorial jurisdiction of the state, the protection of whose laws they invoke: *Yick Wo v. Hopkins*, 118 U. S. 356, 369. The same is true of the act of Congress (U. S. Rev. Stats, sec. 1977), passed under the authority of the fourteenth amendment, by which it is provided that "all persons within the jurisdiction of the United States shall have the same right in every state to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like taxes, licenses, and exactions of every kind, and to no other." The rights thus secured are those only of persons who at the time are within the jurisdiction—that is, within the territory or under the flag, of the United States.

A state has a right to debar aliens (and as has been stated, it does not appear that any Americans are among the non-resident stockholders in the defendant company) from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. The right of association under the protection of an artificial personality, and of

doing business on its credit, whether it be obtained by a special charter or under a general incorporation law, is a franchise granted by the state to such, and such only, as she may deem fit to be intrusted with its exercise. Whatever may be the law as to citizens of other states, aliens can be excluded from membership in such bodies, unless they enter them on conditions which subject their investments to such burdens of taxation as the legislature may think it proper to impose: *Mager v. Grima*, 8 How. 490, 494.

The laws of Connecticut for more than thirty years have required the payment into her treasury, annually, of a fixed percentage of the market value of all stock in her insurance corporations held by nonresidents: Pub. Acts 1866, c. 29, p. 19. This rate, from 1866 (which was only three ⁶⁰¹ years after the grant of its charter to the defendant) to 1897, was one per cent; and during all this period resident stockholders were taxed their shares in a very different manner. The statute now in question, by which the percentage was raised to one and one-half per cent, was passed on May 13, 1897, to take effect on July 1st. The tax was to fall on the shares which might be held by nonresidents on October 1st. Ample opportunity was thus given to them to sell out their holdings in order to avoid this new burden; and those who remained can stand on no better footing than if they had bought their stock after the passage of the statute and with full knowledge of its terms.

The tax in question is, in form, one against the corporation: *State v. Royce*, 68 Conn. 311. In substance it is one against each of its nonresident stockholders, to be paid by it in their behalf: *Batterson v. Hartford*, 50 Conn. 558, 560. It is imposed only on corporations "whose stock is liable to taxation and not otherwise taxed." It is measured by the number of shares held by nonresidents, and the value of each share. These shares do not belong to the corporation, and a tax on their value is virtually a tax against their owners: *Oliver v. Washington Mills*, 11 Allen, 268, 273. Where all the shares in a corporation are massed for purposes of assessment and taxation, this can be regarded as merely a convenient mode of ascertaining the value of its own property: *Nichols v. New Haven etc. Co.*, 42 Conn. 103, 120. No such construction can be given to a statute which fastens only upon such shares as are held by a particular class of persons. That now in question does no more than make the defendant the paymaster as respects the state. The nonresident shareholders owe the tax, as respects the cor-

poration. The original law of 1866 was therefore careful to provide (section 2) that every insurance company, paying the tax which it imposed, should "have a lien upon the stock of such nonresident stockholders, for the reimbursement of said sums so required to be paid." In General Statutes, section 3917, a similar lien is given "upon the stock of each nonresident stockholder" with the added words, "to the extent of one per cent. of the value of his stock as contained in said list." The list to which reference is thus made is that to be returned under the preceding section, which as now amended makes the sum "required to be paid" one and a half per cent of the value of the stock.

It is strongly urged that to compel the defendant to discharge its shareholders' obligations, and then only give it a lien for two-thirds of the moneys that may be thus advanced, is contrary to natural justice, and also in violation of the provisions of the fourteenth amendment to the constitution of the United States, that no state shall deprive any person of property without due process of law. General Statutes, section 1923, strips this argument of force. That declares that every corporation, when it is not otherwise provided in its charter, "shall at all times have a lien upon all the stock owned by any person therein, for all debts due to it from him." A tax, in the strict signification of that term, may not constitute a debt to the sovereignty or municipality by which it is imposed: *Lane County v. Oregon* 7 Wall. 71. But by General Statutes, section 3901, "all taxes properly assessed, shall become a debt due from the person, persons, or corporation, against whom they are respectively assessed, to the city, town, district, or community in whose favor they are assessed, and may be in addition to the other remedies provided by law, recovered by any proper complaint or proceeding at law, in the name of the community in whose favor they are assessed." Those payable to the state are deemed to be collectible in a similar way: *State v. New York etc. R. R. Co.*, 60 Conn. 326, 334. By becoming members of the defendant company after the passage of the act of 1897, or by remaining members subsequent to that event, every nonresident stockholder may fairly be deemed to have assented to any payment which it might be legally compelled to make in his behalf under the provisions of that law, and so to have come under a contractual obligation for the reimbursement of the moneys so advanced. For the full performance of that obligation, the defendant had a lien under General Statutes, section 1923, though

its lien under General Statutes, section 3917, would ⁶⁰³ be only a partial one. These two sections may well stand together, one giving a better remedy than the other, but both having similar purposes in view.

There is nothing in the objection urged in the demurrer to the complaint, that the law in question "attempts to impose a tax upon personal property outside the jurisdiction and beyond the territory of the state." Each nonresident shareholder participates in the enjoyment of a franchise granted by this state, and has an equitable interest in property which is protected by this state, and whose legal owner (the defendant) is one of its own citizens. The sovereign power which gave his shares a being could also give them a situs within its territory for purposes of taxation: *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490; *Lockwood v. Weston*, 61 Conn. 211, 218. To do this it is not necessary to declare in terms that they shall be deemed to be situated where the corporation belongs. It is enough to lay a tax upon them there, and impose a lien upon them there.

This demurrer also sets up that the tax in suit is one "upon property of the defendant which is otherwise taxed," and so unauthorized by the statute, which applies only to shares of "stock liable to taxation, and not otherwise taxed." This claim, plainly stated, is not that the shares of stock held by nonresidents are otherwise taxed by law, but that the property of the defendant, which gives them their value, is otherwise taxed, in whole or part. As the tax is one upon certain shares held by certain individuals, which are not otherwise taxed, it is immaterial whether the property of the defendant is otherwise taxed or not. Taxing that is not the same thing as taxing its capital stock in the hands of its shareholders.

The pith of the answer to the complaint is, that the board of equalization ought to have allowed the deduction claimed from the market value of the shares on account of the defendant's holdings of taxable real estate. Such a deduction is provided for by General Statutes, section 3836, in favor of every resident shareholder. His shares are to be set in his list in the town in which he resides at their market value, "but so ⁶⁰⁴ much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of its stock, in its returns to the assessors."

If such a deduction ought to have been made by the state board of equalization, the defendant can properly avail itself,

in this proceeding, of their omission of that duty. The only question is, whether a certain amount, as to which there is no dispute, should have been subtracted from the market value of the stock. The provision of the statute (Gen. Stats., sec. 3930), that the "valuation of the estate" made by the board "shall be final," does not preclude the courts, in a suit for the tax, from correcting any errors in the mathematical process by which such valuation was reached: *State v. New York etc. R. R. Co.*, 60 Conn. 326, 336.

There is no statute which in terms required or authorized the board to allow the deduction claimed. The returns to the assessors referred to in General Statutes, section 3836, are those required in October, annually, from all corporations "whose stock is liable to taxation," to the assessors of each town in the state in which any of their stockholders may reside, stating their names and the market value of the shares during the preceding month: Gen. Stats., sec. 3837. The general assembly had the right to give this privilege or rebate to our own citizens, and to withhold it from aliens. We do not intimate an opinion as to whether it would constitute an immunity, the benefit of which could be claimed by citizens of other states; for, as has been already stated, their rights are not put in issue by the pleadings. It is sufficient to support the judgment appealed from that, although the reduction by the board of equalization of the market value of the defendant's shares owned by nonresidents, from two hundred and thirty dollars to two hundred and twenty dollars, is slight, as compared with that which resident stockholders are entitled to claim from the local assessors, the favor thus shown to our own citizens is not forbidden by any provision in the constitution of this state or of the United States, nor inconsistent with any of those maxims of jurisprudence which define the meaning of "legislative power" as vested by our constitution in the legislative department. Every foreign stockholder consented to the inequality, when he elected to continue to participate in the benefits of the defendant's franchise, after the passage of the act of 1897; and it does not appear that the interests of any but foreigners are involved.

The result which we have reached may practically throw upon the nonresident shareholders in the defendant company the weight of double taxation. Its capital funds have been mainly invested in taxable real estate. To a company differently situated in this respect, the payment of taxes on its real estate might

hardly cause an appreciable diminution of the net earnings which would otherwise be applicable to dividends. But taxes seldom bear equally upon all. There is little in the constitution of this state to limit the discretion of the legislature in imposing them, and nothing which militates against the validity of that now in question.

In view of the issues closed, upon which the judgment of the superior court was rendered, we are of opinion that there is no error.

In this opinion the other judges concurred.

TAXATION OF FOREIGN CORPORATIONS.—The power of a state in dealing with foreign corporations is absolute; it may recognize or ignore them, or accord to them a limited or qualified power or existence. It may throw open its doors and admit them within its borders upon terms of absolute equality with its own incorporations, or it may impose such restrictions upon their entry as it sees fit; and none can question its motives or their policy: See monographic note to *Phoenix Ins. Co. v. Commonwealth*, 96 Am. Dec. 338, on the taxation of foreign corporations. Nor is it any objection to such enactments that, taken in connection with other laws imposing taxes and exacting license fees, they may result in the corporations affected by them being compelled to contribute to the revenues of the states sums largely in excess of those contributed by private persons engaged in the same class of business, and using in its transaction property of the same kind, amount, and value: See monographic note to *State v. Goodwill*, 25 Am. St. Rep. 874; note to *Southern etc. Assn. v. Norman*, 56 Am. St. Rep. 374, 375; *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522.

TAXATION—STOCK IN FOREIGN CORPORATIONS.—Taxation of shares of stock is not a tax on the capital stock of the corporation, as they represent different property interests, are distinct subjects of taxation, and the taxation of both is not double taxation: *Commonwealth v. Charlottesville etc. Co.*, 90 Va. 790; 44 Am. St. Rep. 950, and note. Stock in a foreign corporation may be taxed to the resident owner: *Worth v. Ashe County*, 82 N. C. 420; 33 Am. Rep. 692; *McKeen v. County of Northampton*, 49 Pa. St. 519; 88 Am. Dec. 515; although the capital of such corporation is taxed where it is located: *Bradley v. Baudler*, 36 Ohio St. 28; 38 Am. Rep. 547; *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460; *Dwight v. Mayor*, 12 Allen, 316; 90 Am. Dec. 149. The situs of the shares of stock may, for the purpose of taxation, be fixed by statute at the place where the corporation is located, or at its principal place of business, even as against nonresidents: See monographic note to *Buck v. Miller*, 62 Am. St. Rep. 459, on the situs of personal property for the purpose of taxation. There are many cases, however, which hold that domestic stocks and bonds, bonds and stock of resident corporations, are not taxable in the State of which the corporation is resident, or from which the stocks and bonds issue, when owned by nonresidents of that state: See monographic note to *New Albany v. Meekin*, 56 Am. Dec. 528, as to the place where property may be taxed.

FISK v. HARTFORD.

[70 CONNECTICUT, 720.]

INJUNCTIONS—WHEN REFUSED.—The granting or refusal of an injunction rests in each particular case in the sound discretion of the court; and it ought not to be granted when it would be productive of great hardship, or oppression, or great public or private mischief.

INJUNCTIONS—LACHES AS BAR.—If a party is guilty of laches in applying for an injunction, he may thereby forfeit his claim to that remedy; and if, by his laches, he has made it impossible or very difficult for the court to enjoin his adversary without inflicting great injury thereby, an injunction must be refused, and the party left to his remedy at law.

INJUNCTIONS—LACHES AS BAR.—A riparian owner of a mill, who has permitted a city for many years to take its water supply in increasing quantities from the stream by means of very expensive reservoirs and distributing mains, cannot enjoin such diversion of the water; and his delay in applying for relief is not excused nor justified by the fact that until recently the city had found it convenient to return the water taken, in the form of sewage, to the stream above the mill-owner's dam.

Suit to enjoin the defendant from diverting the waters of Park river until damages accruing to the plaintiffs from such diversion had been ascertained and paid. Judgment sustaining a demurrer to the petition for the relief prayed for. Plaintiffs appealed.

H. C. Robinson and W. F. Henney, for the appellants.

L. E. Stanton and W. J. McConville, for the appellee.

720 TORRANCE, J. The principal question upon this reservation is not whether, upon the facts alleged, the plaintiffs are entitled to any remedy, nor if so to what remedy, but it is whether they are entitled to the specific remedy by way of injunction claimed by them.

The defendant under its second, third, and seventh causes of demurrer contends; in substance, that this court has already decided this question against the plaintiffs in the case of *Fisk v. Hartford*, 69 Conn. 375. In support of this contention it is claimed that the present complaint is substantially the same as the original complaint; that it sets forth no new facts, and no new grounds on which an injunction should issue; and that the prayer for relief is substantially the same as in the former case.

We think the case referred to does not decide the question raised here, and that a comparison of the original complaint and prayer for relief with the present complaint and prayer

for relief clearly shows that the defendant's contention is not well founded. The original complaint in substance and effect prayed that the city might be restrained from disposing of its sewage through the intercepting sewer, and this court said that prayer ought not to be granted. The present complaint prays that the city may be restrained from diverting the waters of Park river and its tributaries into the reservoirs and leading pipes of the city, to the injury of the plaintiffs' rights; and the question whether, upon the facts now stated, this prayer should be granted was neither considered nor decided in the former case, and is now for the first time properly before this court.

We also think that the present complaint states a valid cause of action for damages at least, and that it sets out such facts as would ordinarily entitle the plaintiffs to the equitable relief here sought, unless it also shows that they have delayed so long in applying for it as to make it inequitable now to grant it. The only question, therefore, raised by the demurrer, which we deem it necessary to consider at any length, relates to the laches or delay of the plaintiffs and their predecessors in title in seeking this remedy.

730 The city began to construct its present system of reservoirs for the storage of the waters of Park river and its tributaries, and to divert said waters into such reservoirs and distribute it for public use, more than thirty years ago. The first reservoir was built in 1867, the second in 1868, the third in 1875, the fourth in 1879, the fifth in 1884, and the sixth in 1895. These reservoirs have an aggregate storage capacity of nearly twenty-one hundred million gallons. As they were constructed from time to time the waters of Park river and its tributaries were diverted into them and accumulated therein, and distributed therefrom to the city and its inhabitants for their use. The city during these thirty years has expended very large sums of money in completing its present system of waterworks, including the reservoirs aforesaid, the distributing mains and pipes and its sewerage system; and the city is now and for many years past has been practically dependent upon said waterworks for its supply of water for domestic use, for protection against fire, and for all other purposes for which water is used in cities. All that the city has thus done during the past thirty years in the construction of its system of water supply, and in the use of the waters of Park river and its tributaries, was done with the knowledge of the plaintiffs and their predecessors in title, but without any agreement with them, and

without objection from them until about 1895 or 1896. In the latter year the plaintiffs brought this suit; but, as before stated, it was brought originally not, as now, to prevent the city from diverting the waters of Park river into its reservoirs, but to prevent it from emptying its sewage into the intercepting sewer.

It is, however, further admitted by the pleadings, that until the intercepting sewer was built and used, the city returned to Park river, above the plaintiffs' dam, through its sewer pipes, substantially all the water diverted into its reservoirs, and the important question in the case is whether this fact furnishes a sufficient excuse or justification for the delay of the millowners in asserting their rights. Upon the admitted facts, we think it is clear that the rights of the millowners ⁷³¹ were invaded by the first substantial diversion of these waters in 1867, and they were violated by each subsequent diversion into the new reservoirs as they were built and used from time to time. The water was diverted, not with a view of returning it as water into Park river again, but in contemplation of the fact that it would be used and disposed of as the city saw fit; with the certainty that it would be converted into sewage which the city would have no right to pour into Park river to the detriment of the riparian proprietors, and which it would have the right to carry elsewhere. As against these millowners and other riparian proprietors along this river, the city had no right either to divert or to pollute its waters to the detriment of such proprietors, without their consent and without compensation made for the injury. The fact that the city emptied its sewage into Park river above the dam, and thus lessened the damages which would otherwise have been caused to the millowners by the diversion of its waters, did not make the diversion and pollution of its waters any the less an invasion of the rights of the millowners. The city emptied its sewage here as a mere matter of convenience and to save expense. It could cease to do so when it chose, it could be compelled to carry it elsewhere or pay for the privilege of emptying here, and the millowners had no right to have it emptied here.

We think it is clear that when the city first began to divert this water to the detriment of the millowners, without their consent and without making compensation to them, it was an invasion of their rights, even though the city did return the water so diverted, in the shape of sewage, into the river above the dam; it was such an invasion of their rights as would have been enjoined against in a proper proceeding upon sufficient

proof, and the fact that the water was so returned as sewage would have been no defense in such a proceeding. This invasion and violation of the rights of the millowners has been continuous since 1867, and it has grown in extent with the growth of the city and the use of ⁷³² each new reservoir. So far, then, as the right to an injunction is concerned, the millowners have slept upon their rights during all these years with full knowledge of all the facts. The fact that they were willing to accept the sewage of the city upon sufferance and at the will of the city, in place of the water to which they were entitled as of right, furnishes, we think, no legal excuse for this long delay in asking for an injunction. They now ask a court of equity to cut off the entire water supply of a great city until it pays them the damages to which they shall prove themselves entitled. The city is and will continue to be abundantly able to pay all such damages, and the remedy of the plaintiffs at law to recover such damages is adequate and complete. To cut off the entire water supply of this city for any considerable length of time would cause great public inconvenience and suffering, and would greatly endanger the lives and property of its inhabitants in case of fire, or from disease. The granting or refusal of an injunction rests in each particular case in the sound discretion of the court, exercised according to the recognized principles of equity. It ought not to be granted where it would be productive of great hardship or oppression, or great public or private mischief: *Hawley v. Beardsley*, 47 Conn. 571; *Logansport v. Uhl*, 99 Ind. 531; 50 Am. Rep. 109.

It is a well-established rule in equity that if a party is guilty of laches or unreasonable delay in applying for an injunction, he may thereby forfeit his claim to that special form of remedy; and where in such case, by his laches, he has made it impossible or very difficult for the court to enjoin his adversary without inflicting great injury thereby, an injunction should be refused and the party left to his remedy at law: *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *State v. Paterson*, 40 N. J. L. 244; *Logansport v. Uhl*, 99 Ind. 531; 50 Am. Rep. 109; *Tash v. Adams*, 10 Cush, 252; 2 Pomeroy's Equity Jurisprudence, sec. 817.

Applying these principles to the facts in this case, we think an injunction should not be granted. Great harm would or may result to the city and its inhabitants if an injunction ⁷³³ should be granted, and little or none can result to the plaintiffs if it is refused.

The superior court is advised that the demurrer upon this

point should be sustained, and that an injunction should be refused.

In this opinion the other judges concurred.

INJUNCTION—WHEN WILL BE REFUSED—LACHES.—Injunctions will not be granted when against good conscience or productive of hardship, oppression, injustice, or public or private mischief: *Sheldon v. Rockwell*, 9 Wis. 166; 76 Am. Dec. 265, and note; or where greater injury would be done by granting than by refusing the relief asked: *Richard's Appeal*, 57 Pa. St. 105; 98 Am. Dec. 202. An injunction will be refused, even though the injury is clearly established, where there has been long continued delay in asserting the right, and a remedy exists at law: *Orne v. Fridenberg*, 143 Pa. St. 487; 24 Am. St. Rep. 567, and note; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758. Where the owner of a water-power suffers a city to erect water-works designed to be fed from the same stream, without objection, and without the assessment and prepayment of his damages, he may not have an injunction against their use on the ground of injury to his water-power: *Logansport v. Uhl*, 99 Ind. 581; 50 Am. Rep. 109.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

FORBES v. HALL.

[102 GEORGIA, 47.]

EXECUTION—INVALIDITY OF EXCESSIVE LEVY.—An excessive levy of execution is void, and a levy is excessive where it is made upon different lots of land and dwelling-houses which are worth nearly twenty times the amount of the fieri facias.

EXECUTION—EXCESSIVE AND FRAUDULENT LEVY—SALE EN MASSE.—To levy upon different lots of land and dwelling-houses, worth nearly twenty times the amount of the fieri facias, and to sell the same in bulk, under the levy, for one fifty-sixth of the value of the property, where it is easily capable of subdivision, is a fraud in law. Such a sale is void and conveys no title to the purchaser.

INJUNCTION—VOID LEVY AND SALE UNDER EXECUTION.—If a levy of execution upon different parcels of property was void because it was excessive, and the sale thereunder was void because all of the property was sold in bulk, when it was easily capable of subdivision, the owner is entitled to an injunction to restrain the purchaser and the officer making the sale from turning him out of possession, especially where the purchaser was the attorney for the plaintiff, and bought the property for one fifty-sixth of its aggregate value.

Petition for an injunction.

Dorsey, Brewster & Howell, for the appellant.

Daley & Hall, for the appellee.

47 SIMMONS, C. J. It appears from the record that Huntley obtained a judgment in a justice's court against Mrs. Forbes for the principal sum of fifty-five dollars, with fifteen dollars and twenty-four cents interest and two dollars and ten cents costs. After the entry thereon by the constable that there was

no personal property of defendant to be found, the execution was levied by the sheriff upon two lots of land, on which were three houses, in the city of Atlanta. Under this levy the property was sold to Hall, the attorney for Huntley, for the sum of twenty-five dollars. When Hall attempted, through the sheriff, to take possession of the land, Mrs. Forbes filed her equitable petition, praying an injunction against Huntley, Hall, and the sheriff, to restrain them from turning her out of possession, and also praying that the sale be set aside on the ground that the levy was excessive and the sale thereunder void. She alleged in her petition that the two lots were of the value of fourteen hundred dollars, and this allegation was sustained by proof. Upon the hearing of the petition and answer and the affidavits submitted by both parties, the judge refused the injunction, and Mrs. Forbes excepted.

These two city lots, with the three dwelling-houses thereon, were sold in bulk by the sheriff. It appears that the sheriff did not attempt to sell them separately or in parcels, though it appears they were capable of subdivision. Under this state⁴⁸ of facts, the court erred in refusing to grant the injunction. The levy of this fieri facias for so small an amount upon property worth nearly twenty times the amount of the fieri facias, and selling the property in bulk under the levy, was a fraud in law, and the sale made thereunder was void and conveyed no title to the purchaser.

The rule seems to be that where land is levied upon more than sufficient to satisfy the execution, if it can be subdivided, it is the duty of the sheriff or levying officer to do so and to sell or offer to sell the land in parcels. Rorer, in his work on Judicial Sales, section 730, says: "When the land is divided into several parcels, though one and the same tract, the several tracts cannot be sold together as in a body, but must be sold separately, with suitable identity of the several lots. If sold in the aggregate, the court, on motion, will set the sale aside. 'Sales in mass, of real estate held in parcels, are not to be countenanced or tolerated.'" Upon the other hand, the rule seems to be that if the land cannot be subdivided so as to be sold in parcels, then the levy is not excessive: Rorer on Judicial Sales, sec. 714. The facts here show that the land was capable of subdivision, and the levy and sale of the land en masse was void: *Brinson v. Lassiter*, 81 Ga. 43, and cases cited.

It is claimed, however, by counsel for defendant in error, that Hall, the purchaser, should not be deprived of his bid,

as he had examined the judgment, fieri facias, et cetera, and the proceedings of the sheriff were apparently regular, and that Mrs. Forbes' remedy was against the sheriff for illegal levy. We do not agree with counsel in this contention. Hall was the attorney for the plaintiff in fieri facias. If he did not have the levy made, he saw from the entry of the sheriff the amount of property levied upon under this small execution. He knew, or ought to have known, in the first instance that the levy was grossly excessive. Being present at the sale, he knew that the sheriff did not offer to sell the property by lot or by parcels. He knew, therefore, not only that the levy was void because it was excessive, but that the sale itself was void because all the property was sold in bulk. He could not shut his eyes to ⁴⁹ these facts and rely upon the apparent regularity of the proceedings of the sheriff: *Wallace v. Trustees*, 52 Ga. 168.

It is also claimed that the sale ought not to be set aside at the instance of Mrs. Forbes, because she has not tendered to Hall the money he paid to the sheriff upon his bid. This, in our opinion, is not necessary. The levy was a fraud in law and was absolutely void. Mrs. Forbes had nothing to do with bringing it about. She was not present at the sale, and claims in her petition that she had no notice that the land was advertised for sale. Besides, Hall, representing the plaintiff in execution, had no right to bid at the sale without the latter's consent. If he had not such consent, the law considers him agent or trustee for the plaintiff in execution, and the money he paid is in law presumed to have been that of the plaintiff himself.

There are other allegations in the petition of Mrs. Forbes, wherein she alleges that the judgment obtained against her was void on the ground that the copy of the summons served on her from the magistrate's court was not signed; that she treated it as a nullity, and did not appear and plead. While we did not deal with this point in the headnote, we are of opinion that the allegation was not well founded. The copy of the summons, although not signed when it was served upon her, was sufficient to have put her upon notice and inquiry and to make it her duty to attend the court and demand that she be served with a proper summons. Especially is this true where it appears from the record that her brother in law attended the court from which the summons issued, and filed a plea, signing her name thereto, on which the case was continued until the next term.

By way of suggestion, we desire here to say that this court and the lower courts are constantly troubled with cases involving the legality of sales where there has been a want of sufficient advertisement and description of the property sold, and the levies under which the sales have taken place have been excessive. A great deal of the time of this court and of the lower courts is taken up in the trial of these cases. We would therefore recommend to the general assembly the enactment of a law requiring that ⁵⁰ all judicial and execution sales of land, including tax sales, be confirmed by the judge of the superior court of the county where the land lies, before the person in possession can be turned out and the purchaser at such sale be put into possession. Should this be done, the judge, before confirming the sale, would doubtless ascertain whether the levy was legal, whether it sufficiently described the property, whether it was excessive, and, if it was excessive, whether the sheriff offered the property for sale in parcels. If this last had been done in the case now at bar, we think the courts would not have been troubled by this litigation. Under section 4856 of the Civil Code, sales have to be confirmed by the chancellor when made under a decree in equity, and we see no reason why this should not be extended so as to make it the duty of the judge of the superior court to confirm all judicial and execution sales of land before they shall become effectual to pass title or to change possession.

Judgment reversed.

All the justices concurring.

EXECUTION—WRONGFUL SALE OF PROPERTY UNDER—INJUNCTION.—Unless there are some special circumstances rendering remedies at law inadequate, equity will interfere to prevent the wrongful sale of property under execution: Note to *Driggs' Bank v. Norwood*, 4 Am. St. Rep. 82.

EXECUTION—FRAUD—TITLE.—A fraudulent execution sale conveys no title as against creditors: Note to *Crary v. Sprague*, 27 Am. Dec. 116.

EXECUTION SALE EN MASSE—SETTING ASIDE.—If property, susceptible of division, is sold under execution en masse for an inadequate price, without being first offered in separate parcels, the sale will be set aside, if the application is made within a reasonable time: Note to *Anniston Pipe Works v. Williams*, 54 Am. St. Rep. 56.

JACKSON v. BROWN.

[102 GEORGIA, 87.]

ACCOUNTS—LIQUIDATION OF, BY GIVING NOTES—RECOVERY.—If one accepts from another, in liquidation of an open account, a negotiable promissory note, he cannot recover in a suit upon the original cause of action, unless, upon the trial, he produces the note, or satisfactorily accounts for its absence.

ACCOUNTS—LIQUIDATION OF, BY GIVING NOTES—ERRONEOUS INSTRUCTION.—In an action upon an open account, it is error to practically direct a verdict for the plaintiff, where the evidence is conflicting as to whether or not a negotiable promissory note was given in liquidation of the account, but there is sufficient to justify a finding that such a note was given.

Complaint on account.

Rawlings v. Hardwick, for the plaintiff in error.

Evans & Evans, for the defendant in error.

87 ATKINSON, J. Plaintiff sued the defendant upon an open account. The defendant pleaded, that on May 3, 1895, plaintiff agreed to furnish him with supplies to the amount of one hundred dollars to make his crop and to live on during the year 1895, in consideration of which the defendant executed his promissory note to the plaintiff, dated May 3, 1895, due January 1, 1896, for one hundred dollars principal, and twelve dollars and fifty cents interest; and to secure the payment of the note delivered to the plaintiff his (defendant's) deed to certain land, described. The plaintiff furnished him one hundred dollar's worth of supplies according to contract, but no more. The twelve dollars and fifty cents which the note expressed as being for interest on the note from May 3, 1895, to January 1, 1896, was in excess of the lawful rate of interest; and the note and deed are therefore tainted with usury, and the deed passed no title. He prayed that plaintiff be required to bring the deed into court to be canceled as void and as a cloud upon the defendant's title, and for general relief. Upon the trial the jury found in favor of the plaintiff. The defendant moved for a new trial, upon the general grounds, and further, because the court erred in charging the jury that they were bound, under the evidence submitted, to render a verdict for the plaintiff, and that usury or no usury was the only question ⁸⁸ upon which they were called upon to pass, and thus excluded from the jury all consideration of movant's plea that every item of the account sued on had been settled and was included in a negotiable promissory note which defendant had given to plaintiff, and that until that

note was sued on or produced in court there could be no verdict or judgment against the defendant.

The evidence introduced upon the trial was, substantially, as follows: Plaintiff testified that the account sued on was correct, due, and unpaid. The defendant did not give him a promissory note, as described in the defendant's plea. Defendant owed him only an account. In answer to notice to produce the note, he made the statutory showing that he could not do so. With this evidence he closed. The defendant testified in accordance with the allegations of his plea, and offered in evidence a deed from himself to the plaintiff to the land described in the plea. The deed was upon its face absolute. It was dated March 15, 1895, and recited a consideration of one hundred and twelve dollars and fifty cents. It was recorded May 3, 1895, and the plaintiff testified that it was not delivered until that date. He introduced also a bond for titles to him from the plaintiff to the property conveyed by the deed. The condition of the bond was as follows: "If said R. B. Jackson, by good and sufficient deed, certain property this day conveyed to said R. W. Brown by said R. B. Jackson to secure his certain promissory note for one hundred and twelve dollars and fifty cents, dated May 3, 1895, and to become due January 1, 1896, with interest, said note being payable to the order of said R. W. Brown, upon payment of said note, according to the tenor and effect thereof; said property being," et cetera (describing it). The plaintiff testified, in rebuttal, that the deed was given to secure advances to be made, and not for a loan of money. No note was ever given, and when he signed the bond for titles he did not read it. Defendant presented the same to him, and said it was a showing that the deed was given to secure the advances to be made, and he (plaintiff) signed it without reading it.

The instruction of the court was a practical direction of a verdict in favor of the plaintiff in the suit upon the open account. ⁸⁰ Upon the question as to whether or not the open account had been liquidated by the defendant giving to the plaintiff a negotiable promissory note covering the several items of indebtedness sued for, the testimony was in conflict. The defendant testified that he executed such a note, and introduced certain documentary evidence which would seem to support that contention. The plaintiff denied this, and testified to the contrary. The note was not produced at the trial, and could not have been, under the plaintiff's contention. The question then

is, whether, where one accepts from another, in liquidation of an open account, a negotiable promissory note, he can recover in a suit upon the original cause of action, unless, upon the trial, he produces the note, or satisfactorily accounts for its absence. We think the authorities answer this question in the negative. If the note were in point of fact given, and is unpaid, it may be in the hands of an innocent holder for value. If that be true, such holder could enforce payment from the maker of the note. The consequence is, that the defendant may be twice subjected to the payment of the same debt. He would certainly be liable to the holder of the note, and the payment of the judgment rendered upon the open account, which was the consideration of the note, would not absolve him from liability to the holder. We do not think the law will subject him to this twofold responsibility. It will not suffer the plaintiff to collect the open account while the note may be still in the hands of a bona fide holder. It seems to be a well-established rule of law that, where a bill of exchange or negotiable note is taken for a prior debt, a party cannot recover upon the original consideration unless the bill or note is produced to be canceled at the trial, or unless it appears that it can not be enforced by a third person: *Miller v. Lumsden*, 16 Ill. 161; 18 Am. & Eng. Ency. of Law, 176; *Schepflin v. Dessar*, 20 Mo. App. 569; *Teaz v. Chrystie*, 2 E. D. Smith, 621; *Matthews v. Dare*, 20 Md. 248.

As we have seen before, the evidence was in conflict upon the question as to whether the note was in fact given. There was sufficient evidence from which the jury might have found that it was. If so, the plaintiff would not be entitled to recover⁸⁰ upon the original cause of action, without the production of the note, or giving a satisfactory account for its absence.

We conclude, therefore, that in view of the evidence submitted upon this question, the court erred in giving a charge which amounted to a practical direction of a verdict in favor of the plaintiff in this case.

Judgment reversed.

All the justices concurring.

TRIAL—DIRECTION OF VERDICT.—It is not proper for the court to direct a verdict for the plaintiff, unless the evidence clearly establishes his right to recover: *Moore v. Baker*, 4 Ind. App. 115; 51 Am. St. Rep. 203. If a conclusion upon an issue of fact must be drawn from conflicting testimony, it must be submitted to the jury: *Hogben v. Metropolitan etc. Ins. Co.*, 69 Conn. 503; 61 Am. St. Rep. 53.

O'CONNELL v. SUPREME CONCLAVE KNIGHTS OF DAMON.

[102 GEORGIA, 142.]

INSURANCE—BENEFIT CERTIFICATE—QUALIFIED ANSWERS—ERRONEOUS INSTRUCTION.—If a benefit certificate is granted upon condition that the statements in the application therefor are true, and the applicant states in his application, which is made a part of the certificate, that he was fifty-four years of age at his last birthday, to the best of his "knowledge and belief," it is error, where suit is brought upon the policy, to charge that, if the applicant was materially older, when he made the application, than he represented himself therein to be, "the policy issued to him upon the faith of such representation would be void, because such representation was a material warranty." The qualification as to "knowledge and belief" should be called to the attention of the jury.

INSURANCE—BENEFIT CERTIFICATE—QUALIFIED ANSWERS—KNOWLEDGE OF FALSITY, WHEN MATERIAL.—If an application for insurance in a mutual benefit society, and which is made a part of the benefit certificate, states that the applicant was fifty-four years of age at his last birthday, to the best of his "knowledge and belief," and suit is brought upon the policy, it is material whether or not the applicant knew his statement to be false, and a recovery cannot be defeated without showing that the applicant knew, or had reason to believe, that he was over fifty-four years old when the application was made.

INSURANCE—BENEFIT CERTIFICATE—GOOD FAITH OF QUALIFIED ANSWERS SHOULD BE SUBMITTED TO JURY.—If the applicant for insurance in a benefit society gives his age according to the best of his "knowledge and belief," and a recovery is sought upon the policy, the application being made a part thereof, his good faith in answering should be submitted to the jury. If the answer was made in good faith, the applicant believing it to be true from his best knowledge upon the subject, then the plaintiff would be entitled to recover as against the plea of the falsity of the answer; but if, on the contrary, the answer did not state the matter thereof truly, and intentionally did not state it truly to his best knowledge and belief, then the plaintiff would not be entitled to recover as against such plea.

INSURANCE—BENEFIT CERTIFICATE—FRAUD—PLEADING AND BURDEN OF PROOF.—The party alleging fraud must prove it. Hence, if the defendant, in a suit upon a benefit certificate, alleges fraud, on the part of the applicant, in answering as to his age, the burden is upon the insurer to prove that the applicant made false and fraudulent representations regarding his age, for the purpose of inducing the defendant to issue him the certificate.

INSURANCE—BENEFIT CERTIFICATE—QUALIFIED STATEMENTS AS CONDITIONS PRECEDENT—PROOF OF TRUTH.—If statements in an application for a benefit certificate are qualified as being true to the best of the applicant's "knowledge and belief," such statements are conditions precedent, the truth of which the plaintiff must prove before he can recover.

INSURANCE—BENEFIT CERTIFICATE—RELATION OF POLICY TO APPLICATION—MATTERS OF DEFENSE.—In making a prima facie case for recovery upon a benefit certificate, the action is to be treated as founded on so much of the contract as is set forth in the policy, leaving stipulations, warranties, and con-

ditions expressed only in the application to be brought to the notice of the court defensively by the society.

INSURANCE — BENEFIT SOCIETIES — RELATION OF SUBORDINATE LODGE AND SUPREME CONCLAVE—ASSESSMENT.—Whether the act of an officer of a subordinate lodge of a given order is, in a particular instance, binding upon the "supreme conclave" of the same order depends upon the relation of the former to the latter, as defined by its constitution and by-laws, and upon what is therein provided. Hence, in the absence of necessary information on these points, it cannot be intelligently determined whether or not the payment of an assessment to an officer of the subordinate lodge would, in legal contemplation, be a payment to the "supreme conclave."

Action on an insurance policy.

Hardeman, Davis & Turner, for the appellant.

Steed & Wimberley and A. W. Lane, for the appellee.

144 FISH, J. The application for insurance, signed by Cornelius O'Connell, stated: "I, . . . do declare upon my honor that the statements by me subscribed herein, are each and every one of them true, to the best of my knowledge and belief." It also contained the further statement: "I do hereby consent and agree that any untrue or fraudulent statement made above, or to the medical examiner, or any concealment of facts by me in this petition, shall forfeit the rights of myself, my beneficiaries, and my family or dependants to all benefits and privileges therein." The benefit certificate stated: "This certificate is issued to Cornelius O'Connell, . . . upon condition that the statements made by said person in the petition for this membership . . . and the statements certified by said petition to the medical examiner . . . be made a part of this certificate." The judge charged, in effect, that if O'Connell was materially older when he made the application than he represented himself therein to be, then the policy issued to him upon the faith of such representation would be void, because such representation was a material warranty. While section 2097 of the Civil Code provides that: "Every application for insurance ¹⁴⁵ must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant," and section 2098 prescribes that: "Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void"; and while the general rule is well settled that the effect of a material warranty is to make void the policy if the statements made are not literally true, without regard to the willfulness of the falsity (11 Am. & Eng. Ency. of Law, 291; Bliss on

Insurance, sec. 38; 1 May on Insurance, sec. 156), yet, in the case now under consideration, the application, which is made a part of the benefit certificate, while stating that the applicant was fifty-four years of age at his last birthday, also states that he declares upon his honor that the statements subscribed are each of them true "to the best of my knowledge and belief." This qualification was not called to the attention of the jury in the charge. It cannot be said, under such a statement, that the applicant assumed, or attempted to assume, the whole risk of his answer being true. It is a statement that he believes himself to be fifty-four years old, and that to the best of his knowledge his statement was true. It was therefore material whether or not the applicant knew his statement to be false. The court by its charge, instead of putting the case to the jury in this light, instructed them, in effect, that the applicant assumed the whole risk of the consequences, if his answer turned out to be untrue. If the statement had been made without this qualification, then the sections of the code above cited and the general rule as to warranties would have been applicable, and the charge, in this respect, correct. If O'Connell's statement can be considered as amounting to a warranty at all, it is nothing more than a warranty that, so far as his information and knowledge extended, he was fifty-four years of age at his last birthday. Under such warranty, or mere representation, whichever it may be called, in order to defeat a recovery upon the policy, it would be necessary to show that the applicant knew, or had reason to believe, that he was over fifty-four years old when the application was made: See *Hann v. National Union*, 97 Mich. 513, 37 Am. St. Rep. 365, where the statement ¹⁴⁶ in the application and certificate were almost identical with the statements here. In *Clapp v. Massachusetts Ben. Assn.*, 146 Mass. 519, where a certificate of benefit insurance was issued on the condition that the statements of the application, which were made a part of the contract, were "in all respects true," and an acknowledgment at the end of the application recited that the applicant does "hereby warrant each of the foregoing statements to be true to the best of my knowledge and belief, and that I have not concealed any material information," agreeing that any "untrue or fraudulent statements" made by or for him should forfeit the insurance, it was held that the words "best of my knowledge and belief" qualified the words "untrue and fraudulent statements," as well as the word "true." In that case Devens, J., delivering the opinion of the court, said: "Undoubtedly, the acknowledgment may grammatically be sep-

arated into two parts—the first a warranty that the statements made are true according to the best of the applicant's knowledge and belief, and the second an agreement that any untrue or fraudulent statement may forfeit the contract. But if susceptible of such a grammatical construction, it can hardly have been intended that it should have been thus understood. Nor would it be a natural construction, and one that would suggest itself to an applicant. He could not suppose that, while he was only required to warrant that his answers were true according to his 'knowledge and belief,' his certificate or policy was to be forfeited if an answer honestly made should prove in fact untrue. The language used in the form of an acknowledgment does not suggest any idea so much in the nature of a contradiction as this. . . . These forms are prepared by the insurer with great care and great minuteness of detail. They are often signed in comparative haste. . . . If the association had intended to impose a forfeiture of his certificate upon the applicant because of an untrue statement, while it had only required of him to warrant that his statements were true to the best of his knowledge and belief, a contract so anomalous should have been clearly expressed. It must be presumed that the defendant prepared its forms of application ¹⁴⁷ and certificate with the intention both of protecting itself against fraud and of securing the just rights of the assured under a valid contract. It is reasonable that its words should be construed against itself, rather than in such a manner that one dealing with it should by any ambiguity be deceived as to his rights." We are of the opinion that the judge should, in the case at bar, have submitted to the jury the question as to whether or not O'Connell acted in good faith in making his answer to the question about his age propounded in the application. If the answer was made in good faith, the applicant believing it to be true from his best knowledge upon the subject, then the plaintiff would have been entitled to recover as against the plea of the falsity of the answer; but if, on the contrary, the answer did not state the matter thereof truly, and intentionally did not state it truly to his best knowledge and belief, then the plaintiff would not have been entitled to recover as against such plea: See *Anders v. Supreme Lodge Knights of Honor*, 51 N. J. L. 175; *Mulville v. Adams*, 19 Fed. Rep. 887; *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89; 32 Am. Rep. 751; 1 May on Insurance, sec. 161.

2. The judge charged substantially that the burden was upon the plaintiff to prove that O'Connell, in his answer to the ques-

tion in the application, truthfully stated his age. The action was complaint, and the petition said nothing of the application, referring only to the policy, a copy of which was attached to the petition. The defendant pleaded that: "This defendant says that it is not indebted to the plaintiff in any sum whatever upon said certificate of insurance, for that the said Cornelius O'Connell procured the same to be issued to him . . . by false and fraudulent representations regarding his age and other matters, for the purpose of inducing said conclave to issue said certificate contrary to its rules," et cetera. The defendant in this plea distinctly alleged fraud, and the rule ordinarily is, that the party alleging fraud must prove it. There is nothing here to vary the rule. The burden was upon the defendant to satisfy the jury, by a fair and reasonable preponderance of the evidence, that O'Connell made false and fraudulent representations regarding his age, for the purpose ¹⁴⁸ of inducing the defendant to issue him the certificate. The statements in the application, being qualified as being true to the best of the applicant's knowledge and belief, were not conditions precedent, the truth of which plaintiff had to prove before she could recover: *Clapp v. Massachusetts Ben. Assn.*, 146 Mass. 519. In *Travelers Ins. Co. v. Sheppard*, 85 Ga. 758, which was complaint on an insurance policy annexed to the petition, nothing being said in the petition about the application, Bleckley, C. J., delivering the opinion, said: "Tested by the code, section 3392, the pleading was quite sufficient; and we think it follows that in making a prima facie case for recovery, the action is to be treated as founded on so much of the contract as is set forth in the policy, leaving stipulations, warranties, and conditions expressed only in the application to be brought to the notice of the court defensively by the company. This view of the relation of the policy to the application is perhaps sound independently of statutory provisions": See authorities there cited.

3. In reference to the other charge complained of, it is only necessary to say that whether the act of an officer of a subordinate lodge of a given order is, in a particular instance, binding upon the "supreme conclave" of the same order, depends upon the relation of the former to the latter, as defined by its constitution and by-laws and upon what is therein provided; and this being so, it cannot, in the absence of necessary information on these points, be intelligently determined whether or not the payment of an assessment to an officer of the subordinate lodge would, in legal contemplation, be a payment to the "supreme conclave."

Judgment reversed.

All the justices concurring.

LIFE INSURANCE—FALSE OR FRAUDULENT ANSWERS IN APPLICATION—DEFENSE—PLEADING.—If an insurer relies upon a special matter in defense, such as fraud, misrepresentation, et cetera, he must set it forth by proper pleas. Thus, in an action upon a policy of life insurance, if the defendant wishes to prove that certain statements and representations made by the insured in his answers to questions in his application for insurance were untrue, the defendant must, in his answer, specially plead that such statements or representations were false, although the application was, by a clause in the policy, made a part of the contract of insurance: *Benjamin v. Connecticut Indemnity Assn.*, 44 La. Ann. 1017; 32 Am. St. Rep. 362. He who alleges fraud must prove it: *Bank of Little Rock v. Frank*, 63 Ark. 16; 58 Am. St. Rep. 65. Although answers in an application for life insurance are not strictly true, the company must prove affirmatively that they were fraudulently made, or were material to the risk, even where the policy was conditioned to be avoided by "any untrue or fraudulent answer" to the questions in the application: *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; 24 Am. Rep. 344. Other cases hold that, where one asserts that certain statements are true, and if not true that this fact shall avoid a policy of insurance, the question whether they were material is not important, as the parties have the right to make their truth the basis of the contract: *Note to Foley v. Royal Arcanum*, 56 Am. St. Rep. 626. A policy of life insurance contained a stipulation that it should be void if a certain declaration made in the application by or for the person whose life was insured, and upon the faith of which the agreement was made, should be found in any respect untrue. It was held that such declaration constituted a portion of the contract, that it was made material by the contract, and that the only question of fact respecting the same was whether it was true or false, without reference to its materiality, or the belief of the person making it that it was true: *Day v. Mutual Ben. Life Ins. Co.*, 1 McAr. 41; 29 Am. Rep. 565, and extended note thereto.

REID v. MATTHEWS.

[102 GEORGIA, 189.]

DAMAGES—FRAUDULENT REMOVAL AND CONCEALMENT OF MORTGAGED PERSONALTY.—If, during proceedings to enforce a chattel mortgage by foreclosure and execution, a claimant of the property, who gets possession thereof from the mortgagor, fraudulently removes and conceals it, thus destroying the security of the mortgagee, he is answerable in damages to the latter.

DAMAGES—FRAUDULENT REMOVAL AND CONCEALMENT OF MORTGAGED PERSONALTY—STATUTE OF LIMITATIONS.—A chattel mortgagee's right of action for damages against one who fraudulently removes and conceals the mortgaged property, during proceedings to enforce the mortgage by foreclosure and execution, thus destroying the mortgagee's security, accrues at the time of such act, and the statute of limitations then begins to run; but if the fraudulent intent was not apparent at the time of such act, the statute does not begin to run until after the mortgagee, by the use of due diligence, could have discovered the fraud.

BONDS—ACTION ON BOND TO HAVE PROPERTY FORTHCOMING AT INVALID EXECUTION SALE.—A mortgagee in a proceeding to enforce a chattel mortgage by foreclosure and execution has no right of action upon a bond conditioned to have the property forthcoming at a time and place of sale, if the sale can never take place by reason of the invalidity of the execution under which the levy was made.

Action for damages.

J. A. Cotten and B. L. Tisinger, for the appellant.

J. Y. Allen, for the appellee.

¹⁸⁹ COBB, J. On October 28, 1895, Reid brought an action for damages against Matthews, alleging in his petition, that on April 25, 1890, Parks, to secure a debt due to plaintiff, executed and delivered to him a mortgage on a horse. The mortgage was duly recorded on March 4, 1891, and execution, issued upon what purported to be a foreclosure of the mortgage, was levied upon the horse. Matthews interposed a claim thereto, and attacked the validity of the foreclosure proceeding, and was successful in this attack. On October 26, 1895, plaintiff, having dismissed the first foreclosure proceeding, again foreclosed the mortgage. Execution issued, and the sheriff having made search for the property and failing to find it, made a return to that effect on the execution. Plaintiff then demanded of Matthews that he produce the property which had been in his possession, that it might be levied on under the mortgage fieri facias, which Matthews failed and refused to do. It is alleged that the defendant fraudulently concealed and removed the property, and that, the mortgagor having become a nonresident, plaintiff had lost his debt. It was further alleged that the plaintiff did not discover the fraud perpetrated upon him by the defendant until after April 2, 1894, which was the date ¹⁹⁰ of the decision of this court declaring void the first foreclosure proceeding. The defendant filed a demurrer on the following grounds: 1. The petition set forth no cause of action; 2. The plaintiff's remedy, if he had any, was upon the forthcoming bond which the claimant had given when he filed his claim to the property when levied on under the first foreclosure proceeding; 3. The right of action is barred by the statute of limitations.

1. In the case of *Harris v. Grant*, 96 Ga. 211, the present chief justice in the opinion uses the following language: "If one who knows that another has a mortgage on personal property willfully destroys the property, he will certainly be subject to an action by the mortgagee for damages." In that case it

was held, that the holder of a junior mortgage on personal property, who, with knowledge of the existence of a senior mortgage, received the mortgaged property from the mortgagor, and with his consent appropriated it to the satisfaction of the junior mortgage, and then placed it beyond the reach of the execution issued upon the foreclosure of the latter mortgage, was liable to the senior mortgagee for the value of the property thus received and disposed of, not, of course, exceeding the amount due upon the execution. In view of this decision there was a cause of action set forth in the plaintiff's petition. See, also, the case of *Benton v. McCord*, 96 Ga. 393.

2. The mortgagee's right of action accrues at the time of the fraudulent removal and concealment of the property, and generally the statute of limitations would begin to run in the defendant's favor from that time; but if from the facts and circumstances of the case the fraudulent intent in removing the property was not then apparent, and could not by the exercise of ordinary diligence have been ascertained, the statute would not begin to run against the mortgagee's right of action until a time when by the exercise of such diligence he could have discovered the fraud. As the plaintiff's petition set forth a cause of action, and set forth facts from which it would appear that the action was brought within due time after the discovery of the fraud, it was erroneous to dismiss the petition, either on the first or third ground. As it did not appear on ¹⁹¹ the face of the petition that any forthcoming bond had been given when the first foreclosure proceeding was had, it was error to dismiss the petition on this ground. It would seem, that even if this allegation had appeared in the declaration, the demurrer would not have been well taken, because the mortgagee would certainly have no right of action upon the bond which was conditioned to have the property forthcoming at the time and place of a sale, which could never take place on account of the invalidity of the execution under which the levy was made.

Judgment reversed.

All the justices concurring.

CHATTEL MORTGAGES—FRAUDULENT DISPOSITION OF PROPERTY—DAMAGES.—A chattel mortgagor may be guilty of a fraudulent disposition of the mortgaged property. The mortgagee is entitled to be satisfied out of the specific property: *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449; and he may maintain an action for damages to his reversionary interest, although he has not the right to immediate possession: *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472.

FRAUD—LIMITATION OF ACTIONS.—The rule is, that the statute of limitations will begin to run in cases of fraud only from the date of discovering such fraud, or from such a time as it could or ought to have been discovered by reasonable diligence: Notes to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 516; Chicago etc. Ry. Co. v. Titterington, 81 Am. St. Rep. 47; Lataillade v. Orena, 25 Am. St. Rep. 227.

AMERICAN TRUST AND BANKING COMPANY v. BOONE.

[102 GEORGIA, 202.]

TRUSTS.—THE PRESUMPTION IS THAT A TRUSTEE will faithfully administer his trust and not misappropriate funds committed to his care.

BANKS—TRUST FUND—PRESUMPTION—PAYMENT OF CHECKS.—A bank has a right to assume that money deposited therein by a trustee will be properly applied under the trust. Hence, it may lawfully pay checks drawn by him, whether signed in his representative capacity or not.

BANKS—AIDING IN MISAPPROPRIATION OF TRUST FUND—LIABILITY.—If a bank actively aids a trustee in misappropriating a trust fund, such as money deposited by him in the bank, it is answerable to the true owner for the amount wrongfully appropriated by it to its own uses, particularly where it participates in the misappropriation, and receives the fruits thereof by obtaining payment of a debt due it by the trustee in his individual capacity.

BANKS—OWNERSHIP OF TRUST FUND—MISSTATEMENT BY TRUSTEE—LIABILITY.—If a person owes a debt to a bank and afterward deposits therein, to his individual credit, a check representing a trust fund, his statement to the bank that he owns such fund, though acted upon by the bank, does not exempt it from liability to the owner of such fund, when it appears that such statement was not true, and that the bank knew, by entries upon the check, that the deposit was impressed with a trust.

BANKS—TRUST FUND—MISAPPROPRIATION—INTEREST.—If a trustee deposits a trust fund in a bank, which misappropriates a part thereof, and a demand is made upon the bank by the true owner for the amount which has been misappropriated, as well as for the amount admitted to be due, but the bank refuses payment under such demand, it becomes liable for interest upon the whole amount from the date of such refusal.

INSANE PERSONS—CONTRACTS OF—VALIDITY.—A contract by an insane person, whether executory or executed, is utterly void, even where there has been no judicial determination of the fact of insanity.

INSANE PERSONS—CONTRACTS OF—EVIDENCE OF INSANITY.—An adjudication of insanity is merely cumulative of other evidence on the subject, and in any case where it is shown, either by a judgment of a court, or other competent evidence, that the person making the contract was insane at the time of its execution, such contract is void, although the other party thereto had no reason to suspect the existence of such insanity.

INSANE PERSONS—ADJUDICATION AS EVIDENCE OF INSANITY.—An adjudication by a court, whether of this state or of a sister state, having jurisdiction to determine the question, is at least *prima facie* evidence everywhere of the fact of insanity.

CHECKS DRAWN BY INSANE PERSONS ARE VOID—NOTICE.—A check drawn by an insane person is void, and the bank which pays it must bear the loss, although it had no notice of the fact of insanity.

EVIDENCE—JUDGMENT OF SISTER STATE—INSANITY. The judgment of a court of a sister state adjudicating the question of insanity is admissible in the courts of this state as *prima facie* evidence upon that question.

Equitable petition.

Ellis & Gray, for the plaintiff in error.

Clay & Blair, Arnold & Arnold, W. R. Power, and King & Anderson, for the defendant in error.

202 COBB, J. Boone as administrator of B. F. Cooper brought suit against the American Trust & Banking Company. The case made by the evidence was as follows: B. F. Cooper died **203** on November 2, 1893, and J. H. Cooper, a resident of Atlanta, Georgia, was appointed administrator of his estate by the county court of Orange county, Florida. Among the assets of the estate was a policy of life insurance for the sum of \$5,000. A check for this amount payable to J. H. Cooper as administrator of B. F. Cooper was received by such administrator on December 21, 1893. It was indorsed by him as administrator, and deposited to his individual credit in the defendant bank. He stated to the bank's officer that he was the sole heir of the estate. Having been in business, and having an account with the bank, he had become indebted to it in the sum of \$1,910.74, evidenced by promissory notes. The bank, claiming to act under instructions from him, charged against his account the amount of these notes. After the payment of sundry checks drawn by him, there remained to his credit the sum of \$1,810.53. About December 26, 1893, he became insane, and on the thirtieth day of December, 1893, he was adjudged a lunatic by the circuit court of Orange county, Florida. The fact that he was insane and had been so adjudged was unknown to the bank when it paid a check drawn subsequently to the judgment. He died shortly afterward. The plaintiff was appointed administrator de bonis non of B. F. Cooper on April 19, 1894. B. F. Cooper left a number of heirs, and no settlement of the estate was ever made by J. H. Cooper as administrator. The plaintiff contended that the bank received the check for \$5,000, knowing that it was an asset of the estate of B. F. Cooper, and that the crediting of the amount to the individual account of J. H. Cooper and the application of the same to his individual debt-

edness to the bank was such a misappropriation of the fund as to render it liable to the legal representatives of B. F. Cooper. The bank denied any notice or knowledge that J. H. Cooper contemplated misappropriating the money, or that the money did not in fact belong to him; and claimed to have received the deposit in the regular course of business, and to have paid upon his checks all of the sum so deposited, except \$1,810.53, which amount it has always been ready and willing to pay to the person entitled thereto. It further claimed that, the deposit being general, without agreement to pay interest, it was ²⁰⁴ not liable to pay interest thereon. The jury returned a verdict for the plaintiff for \$3,860.27 principal, besides interest. This amount was made up of the following items: Balance admitted as standing to the credit of the estate, \$1,810.53; amount of notes due the bank, charged to the account of J. H. Cooper, \$1,910.74; check paid on January 2, 1894, drawn by J. H. Cooper after he had been adjudged insane by the courts of Florida, \$139. The defendant made a motion for a new trial, which the court overruled, and it excepted.

1. Every person is presumed to have the intention of discharging whatever duty the law may cast upon him; it is therefore presumed that a trustee will faithfully administer the trust and will not misappropriate the funds of the estate which are committed to his care. When a trustee deposits money in a bank, the bank has a right to assume that the money so deposited will be applied by the trustee to the proper purposes under the trust, and, acting under this assumption, it may lawfully pay the checks drawn by the person depositing the money, whether signed in his representative capacity or not. But while this is true, if it actively aid the trustee in misappropriating the fund, and especially if it participate in the misappropriation, and receive the fruits of such misappropriation by obtaining payment of a debt due it by the trustee in his individual capacity, the bank would be liable to the true owners of the fund for the amount thus wrongfully appropriated by it to its own uses: *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; 30 Am. St. Rep. 159; *Morse on Banks and Banking*, 3d ed., sec. 317. Where the debt thus paid was created before the trust funds were deposited, and the fact that such funds were impressed with the trust was known to the bank by entries upon the check which was delivered to it, the fact that the depositor made statements to the bank that he was the real owner of the fund, and the bank acted upon such statements, would not relieve the bank from its lia-

bility to the true owner of the fund when it appeared that such statement was not true.

2. When it appeared in such a case that a demand was made upon the bank by the true owner for the amount which had been misappropriated, as well as for the amount which ²⁰⁵ was admitted to be due, and the bank refused payment under such demand, it became liable for interest, upon the whole amount from the date of such refusal.

3. On January 2, 1894, when the bank paid the check for \$139 drawn by J. H. Cooper, he had been adjudged to be insane by a court in Florida having jurisdiction of such matters; and there was also other evidence that he was at that time and subsequent thereto in fact insane. This being true, was the bank, which had no notice of the fact of insanity, or that J. H. Cooper by a judgment of a court had been adjudged to be insane, protected on account of such ignorance in the payment of the check? The law of this state upon such question is to be found embraced in section 3652 of the Civil Code. It is there provided that an insane person cannot contract prior to commission sued out and guardianship appointed; that a lunatic may contract during lucid intervals; after guardianship he cannot. By the terms of this section it is declared that an insane person, using this expression in the sense of a person non compos mentis, whether idiot, lunatic, or imbecile, has no power to enter into a contract after such insanity takes place. While there is a conflict in the authorities as to the effect to be given to a contract made by insane persons, "it may now be regarded as a general rule of universal law that the contracts of a lunatic, idiot, or other person non compos mentis, from age or other infirmity, are utterly void": 1 Daniel on Negotiable Instruments, 4th ed., sec. 209; Rogers v. Blackwell, 49 Mich. 192; Dexter v. Hall, 15 Wall. 9; Seaver v. Phelps, 11 Pick. 304; 22 Am. Dec. 372; Anglo-Californian Bank v. Ames, 27 Fed. Rep. 727. Judge Story in his treatise on Bills of Exchange, discussing the question of the disability of insane persons to bind themselves as drawers, indorsers, or acceptors of such papers, says: "This disability flows from the most obvious principles of natural justice. Every contract presupposes that it is founded in the free and voluntary consent of each of the parties, upon a valuable consideration, and after a deliberate knowledge of its character and obligation. Neither of these predicaments can properly belong to a lunatic, an idiot, or other person non compos mentis from age, or imbecility, or ²⁰⁶ personal infirmity. Hence, it is

a rule, not merely of municipal law, but of universal law, that the contracts of all such persons are utterly void. The Roman law in expressive terms adopted this doctrine, *Furiosus nullum negotium gerere potest, quia non intelligit, quod agit*": Story on bills of Exchange, sec. 106. The authorities above cited establish the doctrine that a contract by an insane person, whether executory or executed, is utterly void; and this too when there has been no judicial determination of the fact of insanity except in the trial of the issue where the question is raised to defeat the contract which is sought to be enforced or set aside. Where there has been a judicial determination of the fact of insanity by a court having jurisdiction to inquire into and determine the mental condition of the individual concerned, it would seem that this would be simply evidence admissible for the purpose of proving the fact of insanity, and evidence of a high character, but only cumulative of other competent evidence on the subject. That an adjudication by a court having jurisdiction to determine the question is *prima facie* evidence everywhere of the fact of insanity is well established by authority: 2 Black on Judgments, sec. 802; Buswell on Insanity, secs. 197-199; Woerner on the American Law of Guardianship, sec. 128.

Under the law of this state, above quoted, after the fact of insanity has been established by a court of competent jurisdiction in this state and the affairs of such person vested in a guardian, the power of such person to contract is entirely gone, and such contracts are absolutely void. This part of the section is consonant with the adjudications on the same subject in other states. In the case of *Pearl v. M'Dowell*, 3 J. J. Marsh, 659, 20 Am. Dec. 199, it was held that after office found the contracts of idiots or lunatics were void. Judge Buckner quotes in his opinion to sustain this decision the following extract from Bacon's Abridgment: "Yet it seems that even at law the contracts of idiots and lunatics, after office found, and then party legally committed, are void, and it must be at the peril of him who deals with such a one." The same principle is recognized in the case of *Wait v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391. It is true that in ²⁰⁷ the cases cited the adjudication of lunacy was had in the same jurisdiction in which it was pleaded; but this would not alter the application of the doctrine so far as the adjudication of lunacy is to be used as evidence of the fact. While it may be that in the jurisdiction in which the person is declared to be insane the judgment would be conclusive, still the judgment on this subject lawfully rendered in any other juris-

diction would be at least prima facie evidence of the fact of lunacy; and in any case where it is shown, either by a judgment of a court or other competent evidence, that the person making the contract was at the time of its execution non compos mentis, such contract is void, and "the mere circumstance that, for the time being, he so deported himself as to conceal his lunacy or imbecility, cannot alter his right to be protected against his own misfortune. And though honest persons may be ignorant of his condition, that is their misfortune, and they should not be allowed to throw it upon one already helpless": 1 Daniel on Negotiable Instruments, sec. 210. "The right of avoiding a contract exists, notwithstanding the person with whom the insane man contracted was not apprised of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception": Hovey v. Hobson, 53 Me. 451-453; 89 Am. Dec. 705.

There being evidence that at the time the check in question was drawn by Cooper, and at the time it was paid by the bank Cooper had not only been adjudged insane by a court in another state, but was in fact insane, shown by other evidence than the judgment, the check was absolutely void, and the bank paid it at its peril and must bear the loss. The judgment of the court in Florida adjudicating the question of J. H. Cooper's insanity, if not absolutely binding and conclusive upon the question of his mental condition, on account of his not having been domiciled in the state of Florida at the time the court passed upon the question, would still be admissible in evidence and would be prima facie proof of the fact that the judgment sets up. Cooper, though a citizen of Georgia, having submitted himself to the jurisdiction of the courts in Florida by accepting an appointment as administrator on B. F. ²⁰⁸ Cooper's estate, gave to the courts of that state the right to inquire into his mental condition in order to determine whether he was still able to discharge the duties he had assumed under the Florida law; and having jurisdiction for this purpose, the judgment of the courts of that state would be prima facie evidence in the courts of this state.

4. The record discloses no error which would require the granting of a new trial, and the motion was properly overruled.

Judgment affirmed.

All the justices concurring.

BANKS—DEPOSIT OF TRUST FUNDS—IMPROPER WITHDRAWAL—LIABILITY OF BANK.—If moneys are deposited by one as trustee, he, as such trustee, has a right to withdraw them, and the bank, in the absence of notice to the contrary, is bound to assume, and is protected in assuming, that the trustee will appropriate the moneys, when drawn to the proper use; but if it has knowledge that a breach of his trust is being committed by the improper withdrawal of such funds, or if it participates in the profits or fruits of any fraud upon the trust, it is answerable. If a bank receives a check payable to a depositor as trustee, and credits it to his personal account and permits him to draw it out on his personal check, it is liable with him for a breach of the trust: *Duckett v. National Mechanics' Bank*, 86 Md. 400; 63 Am. St. Rep. 513, and note.

INSANE PERSONS—CONTRACTS OF—VALIDITY.—Insane persons are incapable of entering into a valid contract: *Notes to Hosler v. Beard*, 56 Am. St. Rep. 731; *Bank v. Sneed*, 56 Am. St. Rep. 794. Compare *Moran v. Moran*, 106 Mich. 8; 58 Am. St. Rep. 462, and note. Ignorance of the insanity of one with whom a contract is made is no defense to an action for the recovery of the subject matter of the contract: *Seaver v. Phelps*, 11 Pick. 304; 22 Am. Dec. 372; but in *Lancaster County Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24, the defendant's insanity was held not to be a defense to an action on a note. Compare extended note to this case and *Hosler v. Beard*, 54 Ohio St. 398, 56 Am. St. Rep. 720, as to the liability of insane persons on negotiable instruments and other contracts.

EVIDENCE.—THE COURT RECORDS of certain judicial proceedings in another state are admissible in this state to show that such proceedings were had: *Friend v. Miller*, 52 Kan. 139; 39 Am. St. Rep. 340.

WESTERN AND ATLANTIC RAILROAD CO. v. MORRISON.

[102 GEORGIA, 319.]

TRIAL—FAILURE TO PRODUCE WITNESS HAVING KNOWLEDGE—PROPER ARGUMENT.—In a case where an employé of a railroad company seeks, upon conflicting evidence, to recover damages against the company for personal injuries, and the defendant fails to introduce and examine as a witness one of its employés who was present at the time of the injury, it is proper for the plaintiff's counsel to argue to the jury, whether his contention is well founded or not, that such failure is a circumstance from which an inference may be drawn that, if such employé had been introduced and examined, he would have testified to facts prejudicial to the company; and it makes no difference that counsel for the company caused the employé to be present in court, so that he could have been called by the plaintiff.

WITNESSES HAVING KNOWLEDGE—FAILURE TO EXAMINE THOUGH PRODUCED—PRESUMPTION—INSTRUCTION.—In a case where an employé of a railroad company seeks, upon conflicting evidence, to recover damages against the company for personal injuries, and the defendant fails to introduce and examine one of its employés who was present at the time of the injury, though the company has the witness in court, it is proper to refuse the defendant's request for an instruction charging, in effect, that such production of the employé in court was sufficient

to relieve the defendant of any presumption or inference that, in case he had been examined, he would have testified to facts showing negligence on the company's part.

Action for damages.

Payne & Tye, for the plaintiff in error.

Van Epps, Ladson & Leftwich, for the defendant in error.

⁸²⁰ LUMPKIN, P. J. We shall not discuss in detail the numerous grounds of the motion for a new trial, the overruling of which is the error complained of in the present bill of exceptions. It is a case where an employé of a railroad company, upon conflicting evidence, obtained a recovery for personal injuries. There are no important questions of law involved, except those specially dealt with in the headnotes. The plaintiff's right to a verdict did not turn upon any presumption of negligence raised by law against the defendant. It was a case in which ⁸²¹ he introduced evidence tending to prove the company's alleged negligence, to which it replied with evidence tending to show due diligence on its part; and it was therefore simply a matter for the jury to determine upon which side the evidence preponderated.

It appears from the record that one Waters, who was an employé of the defendant in the capacity of fireman at the time when the injuries in question were sustained, and who had excellent opportunities for knowing the truth of the matter, was not introduced as a witness at the trial. He was, however, at the instance of the company, present in court, and this fact was known to the plaintiff's counsel. The latter, in his argument to the jury, contended that the failure of the defendant to introduce and examine this witness was a circumstance from which an inference could be drawn that, if he had been so introduced and examined, he would have testified to facts prejudicial to the defendant. The court was requested to compel the plaintiff's counsel to desist from making such an argument, on the ground that it was improper and illegal; and was also requested to declare a mistrial because of such "improper argument." The court held that the argument was not improper, and refused to declare a mistrial because of it. It was urged here that these rulings were both erroneous, for the reason that when the defendant produced the witness in court, so that he could have been introduced and examined by the plaintiff's counsel if he had chosen to do so, there could be no proper inference that he knew anything which would be detrimental to the company.

The court also refused to charge the following written request, presented by counsel for the defendant: "As plaintiff's counsel have argued that as only the engineer was examined as a witness, and not the fireman, that this was a circumstance from which the jury might infer that, had the fireman been introduced, his testimony might have shown negligence on the part of the company, I charge you that when the defendant company in open court tendered this fireman Waters as a witness to be introduced by plaintiff if he desired, this was sufficient to relieve defendant of this presumption."

²²² While the arguments of counsel should be confined within legitimate bounds, they should not be too greatly restricted. In *Spence v. Dasher*, 63 Ga. 432, Jackson, justice, said: "Counsel should have ample latitude in argument, and this court will not interfere when it is allowed by the presiding judge, except in cases of clear abuse of discretion and serious damage to the party complaining." Again, in *Inman v. State*, 72 Ga. 278, Justice Blandford remarked: "Counsel are allowed the largest liberty in the argument of cases before juries, and whether the argument be logical or illogical, or whether the inferences and deductions drawn by them are correct or not, this court will have no power to intervene." And in *Taylor v. State*, 83 Ga. 647, the same justice remarked that a certain argument made by counsel "may have been very illogical, but the court could not prevent counsel from drawing illogical deductions from testimony which had been introduced." These are only a few of the instances in which it has been held that considerable latitude is to be allowed counsel in discussing their cases before juries. It is one thing for an attorney to contend that "such and such" a proposition is true, or that "such and such" an inference is deducible from a given state of facts or circumstances, and quite a different thing for the judge to inform the jury that the positions taken by the attorney are correct. If the law imposed upon the judge the duty of interfering with arguments before juries whenever, in his opinion, the reasoning of counsel was unsound, we apprehend that interruptions of this sort would be very frequent indeed.

It is not necessary to rule in the present case that the contention of plaintiff's counsel as to the effect of the defendant's failure to introduce the witness Waters was well taken. It was, after all, a matter to be passed upon by the jury. Nor do we think the argument upon this matter was out of order because the defendant's counsel had caused Waters to be present in

court so that he could have been introduced and examined by the plaintiff's counsel. Presumptively, all persons will tell the truth when sworn to do so; but we know from experience that it is frequently unwise to call as a witness one ³²³ who, for any good reason, is likely to be biased or prejudiced in favor of the opposite side. Every lawyer who has had much practice in the courts is well aware of this, and generally declines, unless compelled by circumstances so to do, to call a witness whom he has reason to believe is hostile to his client or friendly to the latter's adversary.

Theoretically, one party may be under as much obligation as the other to introduce a witness who was present at a transaction or occurrence in dispute, and failure to do so may be said to cut as hard against the one as the other, or that it should not cut against either, when the witness is in court and ready to be examined; but in spite of all the reasoning and refining which may be had on this subject, and notwithstanding intimations and expressions to the contrary by learned judges, the great fact remains that a large number of witnesses are, for various reasons, more or less biased; and it certainly is true that a party may with more safety introduce a friendly witness than one who is otherwise—not necessarily from a desire to have perjury committed in his favor by the former, or from a fear that it will be committed against him by the latter, but because, as everybody knows, there is much in the manner in which a witness testifies, a great deal often depending upon his emphasis, upon the clearness or uncertainty of his recollection, upon his animus and upon a hundred other things which cannot well be described but can readily be imagined, all of which, without bringing him into the attitude of swearing falsely, affect and qualify the force of what he says.

The above-mentioned theoretical rule is, therefore, too broad for universal application, and the lawyer who does not recognize that this is so is apt to make serious blunders in introducing testimony. As an illustration of the matter with which we are now dealing, suppose there was a matter of fact in controversy between A and B, the truth of which was known to no other persons except these two and C, a brother of B. A goes on the stand and gives his version of what occurred; B, in his turn, gives an entirely different version, but does not introduce as a witness his brother C, though the latter is present in court. Is it not a proper matter for contention ³²⁴ by A that B failed to introduce his brother because he knew that the brother's

testimony would prejudicially affect B's case? And if B's counsel should reply to this, "Why did not A introduce C, unless he feared C's testimony would be detrimental to his case?" could not A properly make reply, "I do not care to go into my opponent's family for a witness"? Other such instances might be given, but it is enough to say that in almost every trial the acts or conduct of either party bearing directly upon the questions at issue are legitimate matters of comment. Very frequently, of course, arguments of the nature above indicated should be given little weight, and in each case their value must necessarily depend upon the particular facts and circumstances in proof.

We are of the opinion that the judges should have as little to say about matters of this kind as possible. They should not restrain counsel so long as their arguments are kept within reasonable and proper bounds, and they should also be careful not to usurp the functions of the jury in accepting or in disregarding what the counsel have to say. We therefore think, in the present case, that it was certainly right for the judge to refuse to give in charge the request above quoted. It was not for him to say what effect the production of the employé in court by the defendant ought to have had, and he was surely right in declining to instruct the jury that this, of itself, would be sufficient to relieve the defendant of any presumption or inference that, in case he had been examined, he would have sworn to facts showing negligence on its part.

We do not think the case of *Davis v. Central R. R. Co.*, 75 Ga. 645, relied on by the chief justice in support of his dissent when this case was decided, is controlling upon the question in hand. No point was raised in that case as to the propriety of any argument submitted by counsel, nor did this court, in deciding that case, review any charge, or refusal to charge, by the trial court with respect to the failure of the defendant company to introduce its fireman as a witness. The plaintiffs evidently relied mainly, if not entirely, upon the legal presumption of negligence raised by law against the defendant; and the verdict being against them, they sought a ²²⁵ reversal of the judgment denying them a new trial. We understand their contention to have been that the railroad company could not successfully and completely demonstrate its diligence, and thus overcome the legal presumption against it, without calling as witnesses both the engineer and the fireman who were employed on the locomotive by the running of which the plaintiffs' bull was killed. This

court held, as matter of law, that the testimony of a single witness, viz., the engineer, was sufficient to acquit the company of negligence, if the jury chose to believe that witness; and Justice Blandford said they had the right to do this, if they thought proper. It is true he did remark that, "under the circumstances of this case, the fireman being present and open to plaintiffs, no inference could be drawn against defendant because he was not sworn"; but we are constrained to regard this remark as being merely obiter, the matter to which it relates not being one upon which it was necessary to pass. The real point ruled in that case was, that a railroad company, sued for the killing of livestock, and being required to overcome a legal presumption of negligence, was not obliged, in order to do this, to call and examine as witnesses all of its employes who were or might have been cognizant of the facts of the occurrence. The decision rendered holds simply that, in such a case, the company may, if it so desires, rest its defense upon the testimony of a single employe, taking the risk of his being discredited by the jury; and if the jury choose to believe him, the mere fact that the company did not introduce another of its employes is not of itself sufficient cause for setting aside the verdict and awarding a new trial. It will be noted that the headnotes in that case were made by the reporter, and that the opinion itself was the only official utterance of the court. We repeat, that in determining what effect the decision of that case should have on the case now in hand, it must not be overlooked that there was no question whatever with reference to the argument of counsel or to the court's charging, or refusing to charge, as to what weight or importance the jury should attach to the nonintroduction by the defendant of its fireman as a witness.

326 We deem it unnecessary to the purpose of this discussion to comment at length upon the decision of this court in the case of *Anderson v. Savannah Press Co.*, 100 Ga. 454, to which, we are informed, the chief justice will refer in his dissenting opinion. We are unable to find in that case any intimation of a principle in conflict with what is here laid down; and if the opinion of Justice Atkinson therein contains anything at all relevant to the present question, it supports the view of the same entertained by the majority, for the reason that in that case the rule is distinctly recognized that the nonproduction of evidence within the control of a party may authorize the jury to make inferences unfavorable to such party.

The chief justice will, in his dissenting opinion, also refer to the cases of *Washington v. State*, 87 Ga. 15, and *Johnson v. State*, 88 Ga. 609, and make certain extracts from the opinions therein. Read with reference to the questions under discussion in those cases, it is hoped that the language then used was appropriate and pertinent; but whether so or not, it is difficult to perceive how it can throw much light upon the present controversy, since the question it involves could not possibly have been in mind when those cases were being considered. It is not desired to comment further upon them except to say that in the former, which was a case of arson, the language of the writer which the chief justice will quote was used in endeavoring to establish the proposition that the trial judge erred in allowing the solicitor general, in his argument to the jury, to state "that frequent burnings had occurred throughout the country," and make this statement the basis of an argument for a strict enforcement of the law; and in the latter, the question under discussion was, whether an admission by the accused resulted either from a failure of his counsel to examine the state's witnesses concerning a fact which the court had ruled to be inadmissible, or from a failure to introduce these same witnesses, in behalf of the accused, for the purpose of proving this identical fact, after their exclusion as witnesses for the state. Immediately following that portion of the writer's opinion in the *Johnson* case which the chief justice will quote are the following words: "Let us sum ³²⁷ up the matter in a nutshell: The solicitor general offered to prove a fact by one witness, and stated he could prove it by several others; the opposing counsel objected to the testimony, and the court sustained the objection; then, because this counsel declined to examine these witnesses on the very matter which, at his instance, the court had ruled was not then a proper matter for investigation, and because he refused to introduce these witnesses as his own and examine them about this very matter, it is argued that he thus admits for his client the truth of the thing he had induced the court to rule out. It would be dangerous indeed to object to testimony and succeed in having the objection sustained, or to decline to introduce hostile witnesses, if either of these things resulted in establishing, as against the party so objecting or declining, the truth of that which, from his standpoint and in the opinion of the court, was inadmissible altogether."

We do not think that any decision of this court, upon a careful examination thereof, will be found contrary in principle to what is now decided upon the point in controversy.

Judgment affirmed.

All concurring, except the chief justice.

SIMMONS, C. J., DISSENTED, in a lengthy opinion, from the views and conclusion expressed in the principal case. He took the ground that it is the privilege of a party to rest his case upon such evidence only as he may deem proper and expedient to offer in his behalf; that while the law requires sufficient proof, a party is not bound to introduce all the witnesses to the facts: *Jackson v. State*, 77 Ala. 18, 25; *Patton v. Rambo*, 20 Ala. 485; that there is no duty imposed upon a suitor to call every person as a witness who may give material evidence in his favor, and that an omission to do so is at his peril, but that a failure to call all who are within reach does not necessarily imply a fraud, or a design to suppress the truth, or to impose a falsehood upon the jury: *Bleecker v. Johnston*, 69 N. Y. 309, 312; that, ordinarily, the mere failure to call as a witness one who is equally within the control of both parties is no ground for any presumption against either party: *Bleecker v. Johnston*, 69 N. Y. 309, 312; *Diel v. Missouri Pac. Ry. Co.*, 37 Mo. App. 454; *State v. Rosier*, 55 Iowa, 517; *Miller v. Dayton*, 57 Iowa, 423, 426, 427; *State v. Cousins*, 58 Iowa, 250; and that whatever inferences may be drawn against a party by reason of his failure to produce evidence in his control are allowable only on the theory that he "willfully" withholds such evidence: *Cartier v. Troy Lumber Company*, 138 Ill. 534; for it was conceded that, when one party to an action has in his "exclusive" possession a knowledge of facts which would tend, if disclosed, to throw light upon the transactions which form the subject of controversy, his failure to offer himself as a witness may afford presumptions against him: *Kirby v. Tallmadge*, 160 U. S. 379; *Payne v. Crawford*, 102 Ala. 387; *Hefflebower v. Detrick*, 27 W. Va. 16; *McDonough v. O'Neil*, 113 Mass. 92; *Leeper v. Bates*, 85 Mo. 224, 228; *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656; *Throckmorton v. Chapman*, 65 Conn. 441; though the silence of a party to an action against whom damaging facts are called out is not equivalent to an admission of their truthfulness: *Enos v. St. Paul etc. Ins. Co.*, 4 S. Dak. 639; 46 Am. St. Rep. 796.

The rule authorizing unfavorable inferences to be drawn against a party, by reason of his failure to produce evidence, must, it was said, be given a reasonable construction. If a person is within reach of the process of the court, either party may, with abundant reason, be said to have "equal facilities" for bringing him into court as a witness; and the mere fact that either fails to do so raises no presumption that this person would testify against their particular theory of the case: *Cross v. Lake Shore etc. Ry. Co.*, 69 Mich. 863; 13 Am. St. Rep. 399. No presumption of fraud or of sinister motive could arise where, for instance, a person not called would have been incompetent to testify: *Adams v. Main*, 3 Ind. App. 232; 50 Am. St. Rep. 266; or could not do so with propriety, as where counsel refuses to be a witness for his client: *Gardner v.*

Benedict, 75 Hun, 204; or where a person has been subpoenaed, and is absent through no fault of a party: Weatherford etc. Ry. Co. v. Duncan, 88 Tex. 611; Manhattan Life Ins. Co. v. Alexander, 89 Hun, 449. See, also, Jackson v. State, 77 Ala. 25.

The learned chief justice cited and commented upon Day v. New Orleans etc. Ry. Co., 35 La. Ann. 694, Peetz v. St. Charles St. R. R. Co., 42 La. Ann. 541, Sauer v. Union Oil Co., 43 La. Ann. 699, Gulf etc. Ry. Co. v. Ellis, 54 Fed. Rep. 481, The Fred M. Laurence, 15 Fed. Rep. 635, Schwier v. New York Cent. etc. R. R. Co., 90 N. Y. 558, Bent v. Lewis, 88 Mo. 462, Cole v. Lake Shore Ry. Co., 81 Mich. 156, 95 Mich. 77, as cases in which the rule as to unfavorable inferences seems to have been understood and correctly applied; but he cited other cases tending to show that the maxim "*Omnia praesumuntur contra spoliatores*" has been carried too far: Frick v. Barbour, 64 Pa. St. 120; Seward v. Garlin, 33 Vt. 584; Union Trust Co. v. McClellan, 40 W. Va. 405. Thus, "apparently without regard to whether the evidence could properly be said to be within the exclusive control of one party and not accessible to his adversary, it has been held that an unfavorable presumption arises merely from the nonproduction of an employé": Whitney v. Ticonderoga, 127 N. Y. 40; Wimer v. Smith, 22 Or. 469; or father of the prosecutrix: Rice v. Commonwealth, 102 Pa. St. 408; or father and grantor, whose deed is attacked: Hall v. Vanderpool, 156 Pa. St. 152. "The supreme court of West Virginia seems to have adopted the arbitrary rule that the duty of calling a witness accessible to either side invariably devolves exclusively upon the party carrying the burden of proof, and that a failure to produce such a witness, unless explained, 'raises the conclusive presumption that his testimony, if introduced, would be adverse to the pretensions of such party'": Union Trust Co. v. McClellan, 40 W. Va. 405.

"To hold," said his honor, "that merely because a person be in the employ of one of the parties, he belongs to, or is 'evidence within the exclusive control' of such party, 'not accessible to the other side,' offends reason and perverts the truth." The chief justice then reviewed the Georgia decisions bearing on the subject under investigation, viz.: Hollis v. Stevens, 36 Ga. 463, 473; Nicol v. Crittenden, 55 Ga. 497, 501; Davis v. Alston, 61 Ga. 225; Gainesville R. R. v. Wall, 75 Ga. 282; Hoffer v. Gladden, 75 Ga. 532; Schnell v. Toomer, 56 Ga. 168; Savannah etc. Ry. v. Gray, 77 Ga. 440; Harrison v. Kiser, 79 Ga. 588; East Tennessee Ry. Co. v. Kane, 92 Ga. 188, 193; Richmond etc. R. R. Co. v. Garner, 91 Ga. 27; and Anderson v. Savannah etc. Pub. Co., 100 Ga. 454; and concluded that these decisions "are all fully in accord with the doctrine, above announced, that where it does not appear that a party is acting in bad faith in selecting and offering the evidence upon which he elects to rely, no unfavorable inferences can be drawn against him." Thus, in Thompson v. Davitte, 59 Ga. 473, it was held that, "there is no invariable presumption of law that evidence is true because a party does not rebut it when in his power. Nor is a party to the cause bound to offer himself as a witness at the peril of having everything taken against him which he might, as a witness, contra-

dict"; and in *Schnell v. Toomer*, 56 Ga. 168, it was said that "where it does not appear that the party holds back evidence within his power to produce, the nonproduction of more full and definite evidence than he presents raises no presumption against him." The cases of *Johnson v. State*, 88 Ga. 606, *Johnson v. Slappey*, 85 Ga. 576, *Bennett v. State*, 86 Ga. 401, 22 Am. St. Rep. 465, *Davis v. Central R. R.*, 75 Ga. 645, *Emory v. Smith*, 54 Ga. 273, *Thompson v. Davitte*, 59 Ga. 473, and *Bird v. State*, 50 Ga. 585, were then cited to show that the mere failure of the company, in the principal case, to put the fireman, Waters, on the witness stand did not indicate or furnish proof of an intention on its part to willfully suppress the truth, or to withhold from its adversary the means of possessing himself of evidence by which the truth could be established.

Special notice was taken of the case of *Davis v. Central R. R.*, 75 Ga. 645, wherein it was said: "If the fireman had not been accounted for by the defendant, then the jury, on the trial of the case, might have inferred that he had been kept away because he knew something which might have been damaging to defendant. . . . But, under the circumstances of this case, the fireman being present and open to plaintiffs, no inference could be drawn against defendant because he was not sworn.' There was in that case, as in the present, 'a painful, square conflict,' in the testimony. Nevertheless, as it had a right to do, the company chose to rely upon a single witness, its engineer, though its fireman was also at hand. It was insisted by the plaintiff in error that the company, in order to fully vindicate its diligence, was under a positive legal duty to also introduce its fireman; but the court held that this was not so. Quite naturally, this decision called for the expression of some legal reason upon which it could rest. Accordingly, the rule of law was invoked that, unless certain evidence be peculiarly within the control of one of the parties and inaccessible to the other, no duty devolves upon the one rather than upon the other to produce such evidence or to lay it before the jury, and a mere failure to so do will not justify an unfavorable inference against either party."

The position taken by the Georgia court in the cases cited was said to be "in perfect accord with outside authority." Thus, in *Scoville v. Baldwin*, 27 Conn. 316, "a leading case which has been extensively cited as laying down the correct rule, it was held: 'The omission of a party to call a witness who might equally have been called by the other party is no ground for a presumption that the testimony of the witness would have been unfavorable. The jury have no right to presume anything as to his knowledge of facts important to the case.'" In *Bates v. Morris*, 101 Ala. 282, it was ruled that: "'Where a person, whose evidence would be competent for either party in an action, was in court during the trial and equally accessible to both parties, it is error to charge the jury that they could draw an unfavorable inference against one of the parties for failing to call such person as a witness; and this is true notwithstanding the witness referred to was the husband and grantor of the claimant in a claim suit, where the transfer from him is attacked as fraudulent.' The reasoning employed by Chief Justice

Stone, who pronounced the decision of the court, is simply unanswerable. The following brief extract from the opinion filed by him will suffice to justify this broad assertion: "The husband was in court, accessible to either party, and a competent witness to the same extent for the one party as for the other; and it is difficult to assign any just reason for imputing the failure to examine him as a witness, as a matter of evidential inference, or as ground of unfavorable presumption for or against the one party, which would not apply to the other." For other cases precisely in point, see *Pollak v. Harmon*, 94 Ala. 420; *Haynes v. McRae*, 101 Ala. 318; *Crawford v. State*, 112 Ala. 1; *Nelms v. Steiner*, 113 Ala. 562, 576; *People v. Sweeney*, 41 Hun, 333, 343." "As was said by Lord Mansfield, in *Blatch v. Archer*, 1 Cowp. 65: 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' Obviously, however, this maxim can have no application to a case like the one at bar, where both parties have deliberately declined to avail themselves of identically the same evidence, equally within the power of either to introduce; for the omission of one party to offer such evidence is fully met and evenly counterbalanced by a like omission on the part of his opponent."

"The case of *Crawford v. State*, 112 Ala. 1, is, upon its facts as well as the principle involved, so analogous to the case at bar, it may likewise be cited in this connection. The evidence disclosed that one Bowman was an eye-witness to the tragedy under investigation, but, though present in court, he was not called to the stand by either side. 'One of defendant's counsel, in his argument, said, in substance, that the state had failed to examine this eye-witness to the homicide, who knew more about it than anybody else present at the time of the killing, and that this was a circumstance to be considered by the jury in favor of the defendant.' On objection by the solicitor, the court ruled that this argument was improper, and 'to this action of the court the defendant duly excepted.' Dealing with this point the reviewing court said: 'It was proper to restrain the counsel of the defendant from the proposed argument to the jury that the failure of the state to examine Bowman as a witness was a circumstance for their consideration. The argument was not legitimate, whether applied to the state or to the defendant; and with equal propriety, if there had been propriety in it, it could have been applied as well to the one as to the other. Bowman was in court, as accessible to the one party as to the other; and all that can be properly said is, that neither party deemed it necessary to place him on the stand, adding his testimony to that which had been adduced': See *Crawford v. State*, 112 Ala. 1, 10, 11, 23.

"To allow counsel in the present case, after expressly declining the aid of the additional testimony tendered him, to attempt to make capital out of the fact that this identical testimony was not offered by the other side, would seem not only opposed to reason and justice, but violative of the policy of the law as declared in the rule that the best, or highest, evidence of any given fact is required. So long as it was within the power of the plaintiff to show absolutely

and conclusively what the fireman knew and would testify in regard to the casualty under investigation, the plaintiff could not, without infringing this imperative rule of evidence, rely upon a mere inference or conjecture as to what this eye-witness of the occurrence would swear if put upon the stand."

"There was, in the present case, not a scintilla of evidence even vaguely tending to show a disposition on the part of the defendant to withhold or suppress the truth. As has been seen the law itself did not supply, in lieu of such proof, any presumption or inference whatsoever upon which counsel could rely as a basis for his attack upon the defendant concerning its motive in not introducing all the evidence within its reach. Accordingly, the good faith of the latter in selecting and offering the evidence upon which it elected to stand was not ever so remotely brought into issue, and a totally unfounded suspicion in regard thereto could serve as no proper guide to the jury in reaching their conclusion upon the questions actually presented and legitimately before them for determination. That the unwarranted argument of plaintiff's counsel was calculated to unduly prejudice the defendant's cause, there can be no reasonable doubt; that it actually had this effect is evidenced by the fact that although the great preponderance of proof was apparently on the side of the defendant, the jury nevertheless returned a verdict which utterly repudiated its claim that its defense was righteous and meritorious."

WITNESSES—DUTY TO CALL AND EXAMINE.—A party may bring such witnesses as he can to sustain the issue made by him: *Thurmond v. Trammell*, 28 Tex. 372; 91 Am. Dec. 321. It is the defendant's duty, in an action for negligence, to call and examine a witness whose fault caused the injury, and if he fails to do so, all legal presumptions are unfavorable to his testimony: *Barnes v. Shreveport City R. R. Co.*, 47 La. Ann. 1218; 49 Am. St. Rep. 400.

KISER v. DOZIER.

[102 GEORGIA, 429.]

HOMESTEAD—EXEMPTION—ENLARGEMENT OF CORPUS OF ESTATE.—INVESTMENTS OF THE INCOME derived from property which has been set apart as a homestead go to enlarge the corpus of the estate which produced it, and this is true although the head of the family may have contributed his labor in managing the homestead estate, thus materially increasing the amount of income which would otherwise have been realized, for a debtor cannot be forced to apply his labor to the extinguishment of his creditor's claim

HOMESTEAD—EXEMPTION—RIGHTS OF CREDITORS WHERE CORPUS OF ESTATE HAS BEEN ENLARGED FROM INCOME.—A creditor cannot subject to the payment of a debt due by his debtor property which the latter, as the legal representative of the beneficiaries of a homestead estate, has purchased and paid for exclusively with income derived therefrom.

HOMESTEAD—EXEMPTION—RIGHTS OF CREDITORS WHERE CORPUS OF ESTATE HAS BEEN ENLARGED FROM INCOME.—A mere pretense that a fund coming into the hands of a debtor was derived, as income, from his management of an exempt homestead, will not suffice to defeat the rights of his creditors; nor will property be wholly exempt when purchased by the head of a family, when it appears that it was paid for by him partly with income yielded by the homestead estate and partly with means derived from another and independent source.

HOMESTEAD—EXECUTION ON PROPERTY BOUGHT WITH INCOME OF—CLAIM AS HEAD OF FAMILY.—In case of a levy upon property, which the debtor claimed as the head of a family, alleging it to have been purchased with the income of a homestead estate, the fact that the title to the property thus purchased was taken by the debtor in his individual capacity, and that he made a subsequent conveyance thereof to himself as head of his family, would not support an ordinary claim, unaided by equitable pleadings showing the rights of the beneficiaries of the homestead, for no greater interest therein than that which such beneficiaries could equitably assert would pass by such conveyance, in any event, as against creditors.

HOMESTEAD—EXECUTION ON PROPERTY BOUGHT WITH INCOME OF—CLAIM AS HEAD OF FAMILY—PLEADING.—If property levied upon is claimed by the defendant as the head of a family on the ground that it was purchased by him with the income of a homestead estate, the pleadings should be so framed that there may be added to the homestead what fairly belongs to it, as shown by the evidence, leaving the balance subject to levy and sale.

HOMESTEAD—EXECUTION ON PROPERTY BOUGHT WITH INCOME OF—CLAIM AS HEAD OF FAMILY—ERRONEOUS EXCLUSION OF EVIDENCE.—If property purchased by a defendant is levied on but is claimed by him as the head of a family and the main issue is whether or not it had been previously paid for exclusively with the income of homestead property, it is prejudicial error to exclude notes and mortgages given to various persons by the claimant, particularly in view of his testimony that the property in question had been paid for entirely with the income of the homestead.

HOMESTEAD — EXECUTION — TRANSFER TO ONE'S SELF, AS HEAD OF FAMILY, IN FRAUD OF CREDITORS—ERRONEOUS EXCLUSION OF EVIDENCE.—If a debtor conveys property to himself as the head of a family, and it is shortly afterward levied upon by a judgment creditor, who claims that the conveyance was made with intent to hinder, delay, and defraud creditors, the debtor and defendant asserting an exemption of the property on the ground that it had been paid for exclusively with the income of a homestead estate, it is the duty of the court, in view of evidence that the property was not so paid for, to submit the issue of fraud thus presented to the jury, and a failure to do so is error. It is also error to exclude evidence of the value of the property so conveyed by the debtor to himself.

Levy and claim. An execution in favor of Kiser & Co. was levied upon property claimed by the defendant in execution, Dozier, as the head of a family. Dozier had had certain property set apart to him as a homestead and exemption. This consisted of two lots of land valued at fourteen hundred dollars, and per-

sonalty valued at nine hundred and ninety-two dollars. He afterward did considerable business and bought a number of pieces of property. He gave several notes and mortgages, from which mortgages it appeared that the encumbered property belonged absolutely to him. He became indebted to Kiser & Co., who sued upon the debt, in April, 1892, and on October 31, 1892, one week before the rendition of a judgment in their favor, Dozier executed to himself, as head of a family, a deed recorded exactly one month after its execution, reciting that he had had set apart to himself, as head of a family, a homestead for his wife and children, and that all of the property so conveyed by this deed, consisting of about eight hundred and fifty-nine acres of land, several storehouses, dwelling-houses and lots, and the property levied on, consisting of two hundred and two and one-half acres of land, was bought and paid for by him with the income or proceeds of his homestead property, as he had no other means and could not have paid for it in any other way. He farmed for some years, working at first four mules and then seven or eight mules, originally on homestead property and then on other property bought with money made on the homestead. Dozier carried on the mercantile business for two or three years, but he failed, and it did not appear that he made any money at it. Dozier took deeds in his own name until he conveyed the property to himself as head of a family. There was a verdict in favor of the defendant. The plaintiffs' motion for a new trial was overruled, and they appealed.

W. D. Kiddoo, Hood & Moye, and Harrison & Bryan, for the appellants.

J. H. Guerry and W. C. Worrill, for the appellee.

⁴³⁴ FISH, J. 1. It has been held by this court, and we think correctly, that investments of the income derived from property which has been set apart as a homestead go to enlarge the corpus of the estate which produced it: *Wade v. Weslow*, 62 Ga. 562; *Johnson v. Franklin*, 63 Ga. 378. This is true although the head of the family may have contributed his labor in managing the homestead estate, and thus materially increased the amount of income which would otherwise have been realized: *Kupferman v. Buckholts*, 73 Ga. 778. For a "debtor cannot be forced to apply his labor to the extinguishment of his creditor's claim": *King v. Skellie*, 79 Ga. 151. It follows that a creditor cannot subject to the payment of a debt due by his

debtor property which the latter, as the legal representative of the beneficiaries of a homestead estate, has purchased and paid for exclusively with income derived therefrom.

2. Of course, a mere pretense that a fund coming into the hands of the debtor was derived, as income, from his management of the exempted property, will not suffice to defeat the rights of creditors: *Staples v. Keister*, 81 Ga. 772. Nor will property be wholly exempt when purchased by the head of a family, when it appears that it was paid for by him partly with incomes yielded by the homestead estate and partly with means derived from another and independent source: *Vining v. Officers of Court*, 82 Ga. 222. Where, therefore, the title to property thus purchased is taken by the debtor in his individual capacity, a subsequent conveyance to himself as the head of his family will not operate to vest in him, as such, a legal title to the property which will support an ordinary claim, unaided by equitable pleadings, based upon the ground that such property thus became an absolute addition to the homestead estate. On the contrary, no greater interest therein than that which the beneficiaries of the homestead could equitably assert would pass, in any event, as against creditors; and it would seem, in the absence of equitable pleadings setting up the rights of such beneficiaries, the head of the family could not successfully resist an effort on the part of creditors to subject the property to the payment of claims held against him individually. ⁴³⁵ In this connection, see *Morris v. Tennent*, 56 Ga. 577; *Kupferman v. Buckholts*, 73 Ga. 778, 781; *King v. Skellie*, 79 Ga. 147; *Vining v. Officers of Court*, 82 Ga. 223. In the present case, no pleadings of the nature above indicated were filed, praying that there might be an equitable apportionment or partition of the property which was the subject matter of dispute, so as to add to the homestead what fairly belonged to it, leaving the balance subject to levy and sale. The presiding judge was not, therefore, called upon to instruct the jury as to the law relating to this subject, nor is it incumbent upon us to say more in regard thereto. As this case must undergo another investigation, it is still possible for the pleadings to be so amended as to properly present the issue in question; and doubtless, if this is done and the case is tried in the light of the law as herein announced, exact justice as between the respective parties will result.

3. The main contention of the plaintiffs in the court below was, that the property levied upon had not (as was insisted by the claimant and as was testified to by him) been paid for ex-

clusively with the rents, issues, and profits arising from the homestead estate. In this connection, certain notes and mortgages executed by him, purporting to evidence transactions had with various persons in his individual capacity regarding property which he testified had been paid for entirely out of assets belonging to the homestead estate, were offered in evidence by the plaintiffs, but were excluded by the court. We think error was committed in rejecting these documents. Not only were they admissible as having some evidentiary value of their own concerning the question at issue, upon the idea that they constituted admissions against interest, but they bore directly against the credit of the claimant, who testified as a witness in his own behalf, and thus tended to cast suspicion upon and discount his testimony as to other matters.

4. It was strenuously insisted by counsel at the trial, that the conveyance executed by the claimant to himself as the head of a family, and which was made but a short time before the rendition against him individually of the judgment the plaintiffs were seeking to enforce, was illegal and void, because ⁴³⁶ made with intent to hinder, delay, and defraud creditors. The court did not, however, present this contention to the jury. In view of all the evidence introduced at the trial, this became a vital issue in the case, and it was the duty of the court to have instructed the jury as to the law relating thereto, notwithstanding no written request to charge thereon was presented by counsel for the plaintiffs. Furthermore, we rule, in this connection, that the court committed error in not permitting plaintiffs to introduce evidence as to the value of the property which was included in the conveyance just mentioned. Having raised the issue of fraud, they were entitled to have this transaction closely scrutinized by the jury; and to that end it was their right to demonstrate by competent evidence, if they could, that the value of this property was out of all proportion to any amount which could possibly have arisen as rents, issues, and profits of the homestead estate during the period within which it was asserted by the claimant he had realized from that source the funds with which the property conveyed was purchased.

On the whole, we feel that the plaintiffs were not afforded a full and fair opportunity to have the merits of their side of the controversy duly weighed and passed upon by the jury, and that justice demands that they should be awarded a new trial.

Judgment reversed.

All the justices concurring.

HOMESTEAD.—EXEMPTION LAWS are to be liberally construed in favor of those claiming their benefit. Moneys due for rent of a homestead are exempt from execution: *Morgan v. Rountree*, 88 Iowa, 249; 45 Am. St. Rep. 234.

LYON v. LYON.

[102 GEORGIA, 453.]

INJUNCTION—WIFE'S RIGHT TO, IN SUIT FOR DIVORCE.—A wife who has been driven away from an honorable home by her husband's cruelty, who is living on her own place acquired after such separation, and who is suing her husband for a divorce on the ground of cruel treatment and of habitual intoxication, is entitled to an injunction restraining him not only from interfering with her property, but also from going into her dwelling-house and eating and sleeping therein against her protest; and the prayer for such equitable relief may be joined with the wife's application for divorce.

Petition for a divorce and an injunction, brought by Mrs. Lula T. Lyon against Thomas J. Lyon. The divorce was sought upon the ground of cruel treatment and of habitual intoxication. The parties had not been living together for some time, the wife having been driven from her home by her husband's cruelty and habitual intoxication. She was living on her own place, which was acquired by her after the separation, and which had been deeded to her for life, with remainder to her children. The plaintiff pleaded facts alleged to constitute cruelty and habitual intoxication, and showing the husband's determination to live and remain with her in her own house, and his refusal to go elsewhere. The farm on which the plaintiff lived was rented out to tenants, and the plaintiff alleged that her husband seriously interfered with them. She prayed not only for a divorce, but also that the defendant be enjoined from remaining or coming upon her property, on which she resided, or into her house; from eating and sleeping there; from attempting any control over the tenants upon the place; from interfering with her personal property; and from exercising any control or direction over their two minor children, or interfering with her custody thereof; and for general relief. The defendant answered, denying the allegations of the petition as to his conduct toward the petitioner and her children or tenants, as to drunkenness at his home, and as to his failure and refusal to support the petitioner and her children; and denied that there was cause for a divorce or for an injunction. The evidence upon the hearing of the application for the restraining order was conflicting. The court

ordered that the defendant be restrained and enjoined from interfering in any way with the laborers or tenants of the petitioner until the further order of the court, but refused all the other prayers for injunction or restraint. The plaintiff excepted and appealed.

John W. Akin and Albert S. Johnson, for the appellant.

J. W. Harris, for the appellee.

⁴⁵⁸ FISH, J. 1. While courts of equity are reluctant to interpose in controversies growing out of merely personal or domestic relations, and will ordinarily leave the parties to pursue the remedies open to them in the courts of common law, still when "property rights or questions concerning property arise between husband and wife, parent and child, [or] guardian and ward," jurisdiction will be taken, in a proper case, in order that full and adequate relief may be granted to the injured party: See 1 Pomeroy's Equity Jurisprudence, 2d ed., sec. 99. Thus, "where a husband, by a post-nuptial deed, settles a house and business to the separate use of his wife, to be managed by her for the benefit of herself as if a feme sole, he can be restrained from in any way interfering with the business, and even from entering the house": 10 Am. & Eng. Ency. of Law, 984; citing Wood v. Wood, 19 Week. Rep. 1049. "The aid of equity by injunction is most frequently sought, as between husband and wife, in cases of application for divorce from the bonds of matrimony; and it may be stated, as a general rule, that pending proceedings for divorce, a proper case of emergency being shown, the husband ⁴⁵⁹ may be enjoined from interfering with the custody of the children or of property in possession of the wife": 2 High on Injunction, 2d ed., sec. 1393; citing Wilson v. Wilson, Wright, 129, and Edwards v. Edwards, Wright, 308. See, also, in this connection, Holmes v. Holmes, 4 Barb. 395, in which Barculo, J., on page 297, said: "The rule of the court of equity, in such cases, follows that of natural justice: the husband, by his violation of the marriage contract, forfeits all equitable right to the wife's property. Even when the property has belonged to her before the separation, and has been reduced into actual possession by the husband, courts of equity will restore it to the wife. Much more, in a case like the present, when the property falls to the wife after the separation, should the equitable power of the court be interposed to prevent the husband from receiving it by virtue of that relation which he him-

self has disregarded and violated. It would be difficult to conceive a more plain and palpable outrage upon justice than to permit this old lady to be deprived of her whole share of her father's estate, by an exercise of his marital rights on the part of a husband whose cruelty has driven her from an honorable home and occasioned a permanent suspension of the marriage contract. The authorities are full on this subject": Citing *Van Duzer v. Van Duzer*, 6 Paige, 366; 31 Am. Dec. 257; *Fry v. Fry*, 7 Paige, 461; *Renwick v. Renwick*, 10 Paige, 420. This same equitable doctrine is recognized and enforced in the English courts of chancery: See *Symonds v. Hallett*, 24 L. R. Ch. Div. 346, 53 L. J. Ch. 60; 49 L. T. 380. There it appeared that: "On a marriage, a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees and her husband, claiming administration of the trusts of the settlement and an injunction to restrain the husband from entering the house, [it was] held ⁴⁰⁰ that, under the circumstances, the wife was entitled to an interim injunction."

When, pending a libel for divorce instituted by the wife, she is living in a state of separation from her husband, it may be said that the latter's marital rights are, for the time being, suspended, as he is not at liberty to interfere either with her person or her property. "One carrying on a suit for any form of divorce cannot be cohabiting with the defendant; for thus he would condone the offense, or affirm the marriage sought to be set aside, or otherwise contravene in pais his act in court": 1 *Bishop on Marriage, Divorce, and Separation*, sec. 1757. It is not only the privilege, but the duty, of a wife to live apart from her husband, when he has been guilty of conduct entitling her to a divorce which she has not condoned: *Harper v. Harper*, 29 Mo. 301; *Burns v. Burns*, 60 Ind. 259; *Sykes v. Halstead*, 1 Sand. 483. For "a regard for public decency, as well as the settled usage of the court, requires that under such circumstances the parties should not live together": *Marsh v. Marsh*, 14 N. J. Eq. 315; 82 Am. Dec. 251. It must oftentimes prove a hardship upon the wife to leave her husband's house

and seek an asylum elsewhere. To compel her to give up a home which she herself has provided with her own separate means would amount to intolerable injustice. So, in such a case, the husband having by his own gross misconduct forced the wife to bring about a separation, it must follow that he, and not she, must go forth into the world, leaving the home they had previously shared in common to the enjoyment of its rightful owner. To protect the wife, under such circumstances, against unlawful interference on the part of her husband, during the pendency of a libel for divorce brought against him, would seem to be peculiarly within the province of a court exercising equity jurisdiction.

Under the practice which obtains in this state, a prayer for the requisite equitable relief may be joined with the wife's application for divorce in one and the same petition. In Georgia, since the passage of the married woman's act of 1866, the husband has absolutely no interest, legal or equitable, in property belonging to a wife's separate estate. She is not now—indeed she has never been—under any legal duty to provide for her ⁴⁶¹ husband's support: *Ainsworth v. Ainsworth*, 37 Ga. 627, 634. Upon what pretense, then, can a husband who has cruelly wronged his wife and thus relieved her of even any moral obligation to provide for him, claim the right to occupy with her premises of which she is the sole and undisputed owner, during the pendency of proceedings whereby she seeks a total divorce?

2. In the present case, it appears that much evidence which was clearly inadmissible was admitted over proper objections thereto urged by the plaintiff. The reporter's statements set forth the evidence alluded to, much of which was palpably hearsay, and a portion of which consisted of mere conclusions on the part of the witnesses and was otherwise objectionable. The error thus committed demands that the case should undergo another investigation, which should be conducted in the light of the law as above announced.

Judgment reversed.

All the justices concurring.

INJUNCTION—HUSBAND AND WIFE—DIVORCE.—A husband who has lost his homestead right in the property of his wife by divorce obtained by her against him may be enjoined from committing trespasses, petty annoyances, and acts of disorderly conduct on the homestead premises: *Kern v. Field*, 68 Minn. 817; 64 Am. St. Rep. 479.

DIXON v. BRISTOL SAVINGS BANK.

[102 GEORGIA, 461.]

DEEDS—ESCROW—UNAUTHORIZED DELIVERY OF.—An escrow delivered without authority, or obtained fraudulently, conveys no title either to the grantee or innocent purchasers under him.

DEEDS—ESCROW OBTAINED FRAUDULENTLY PASSES NO TITLE.—If a grantor places a deed in the custody of a depository with express instructions to him to deliver it to the grantee upon the payment, by the grantee to the grantor, of a certain note given by the former to the latter, and the grantee fraudulently procures possession of the instrument from the depository without paying the note, the depository being entirely innocent of any wrong or bad faith, the deed passes no title, either to the grantee, or to an innocent purchaser from him, although it may not be technically an escrow, because of a secret understanding between the grantor and the grantee that the note was never to be paid and that the instrument was never to be delivered, when there is no negligence or fraudulent design on the part of the grantor.

DEEDS—ESCROW—RATIFICATION OF UNAUTHORIZED DELIVERY.—If an escrow has been improperly delivered or obtained from the depository by fraud, the grantor may ratify the delivery. Express ratification is unnecessary, but, in its absence, injury caused by the grantor's silence, inaction, or acquiescence must be shown before a ratification of wrongful delivery can be presumed against him from the facts.

DEEDS—ESCROW—UNAUTHORIZED DELIVERY—QUESTION FOR JURY.—The question of ratification, where an escrow has been improperly delivered, or has been obtained from the depository by fraud, is one of fact for the jury, if the evidence is indefinite and inferences are to be drawn.

TRIAL—QUESTION OF INFERENCES IS FOR JURY, WHEN.—If reasonable men might differ as to inferences to be drawn from certain evidence, the matter should be left to the jury, although there may be no conflict in the evidence.

A NONSUIT SHOULD BE GRANTED ONLY where all the facts proved and all reasonable deductions from them do not entitle the plaintiff to recover.

DEEDS—ESCROW—DEPOSITARY IS AGENT FOR BOTH PARTIES.—The delivery of a deed to an agent or attorney of the grantee employed to obtain possession of the instrument, or to make the purchase for the grantee, is tantamount to a delivery to the grantee, provided the agency includes the very matter of obtaining the conveyance for the grantee; but, while this rule applies where the delivery is made to the agent of the grantee as such agent, it has no application to a transaction, in the nature of an escrow, where the depository is, though an agent or attorney of the grantee, yet not an agent to procure the conveyance, and the delivery is to him as the agent of both parties.

DEEDS—ESCROW—DEPOSITARY AS AGENT FOR BOTH PARTIES.—In a broad sense, every depository of an escrow is the agent of both parties. For the purpose of making delivery upon the performance of the conditions, he is no less the agent of the grantee than the agent of the grantor.

DEEDS—ESCROW—AGENCY OF DEPOSITARY FOR BOTH PARTIES—QUESTION FOR JURY.—If the evidence is uncertain and indefinite as to whether an attorney was made the de-

positary of an escrow as the agent of both parties, to hold it until the performance of the condition and then to deliver it to the grantee, the question should be submitted to the jury.

DEEDS—ESCROW—WHEN POSSESSION IS IMMATERIAL. The question of possession is not material where there has been an unauthorized delivery of an escrow, or where it has been obtained fraudulently, for the reason that the parties claiming under the grantee named in the escrow cannot be protected, unless it is shown that the grantor ratified its delivery or that the depository was the grantee's agent to procure delivery.

Equitable petition.

Alexander & Lambdin, for the appellant.

Rosser & Carter and T. R. R. Cobb, for the appellees.

⁴⁶² **FISH, J.** Annie Dixon was the owner of a lot of land in the city of Atlanta. A deed signed by her, dated February 24, 1891, and purporting to convey the land to F. C. Hitchens, was recorded March 2, 1891. On March 16, 1891, Hitchens made a conveyance of the same land to the Bristol Savings Bank, as security for a loan of two thousand dollars, and on the same day mortgaged the same property to one Barker to secure an indebtedness of one hundred dollars. This latter deed and mortgage were recorded on March 25, 1891. On December 31, of the same year, Annie Dixon brought her petition against Hitchens, Barker, and the bank, alleging that the deed from her to Hitchens was procured by fraud and without consideration; that it was never in fact delivered by her to Hitchens or to anyone for him, but was left as an escrow with a named depository from whom Hitchens had, by fraud and without performance of the conditions of delivery, obtained it; that, until two or three weeks before the bringing of the suit, she did not know of the existence of the two liens created on the property by Hitchens; that they were a part of Hitchens' scheme to defraud her of her property; that the property, at the date of the deed to the bank and of the mortgage to Barker, was in possession of certain parties as her tenants. She prayed for a cancellation of the deeds and of the mortgage, and for other appropriate relief. Hitchens denied all allegations of fraud or improper dealing on his part, and insisted that the land had been bought by him from plaintiff and fully paid for. The bank and Barker answered, that they had loaned to Hitchens the money represented by the deed and mortgage, in good faith and without notice or knowledge of any claim of plaintiff upon ⁴⁶³ the property; that their conduct had been blameless and without fraud; that they had no notice or knowledge that plaintiff was in pos-

session of the land by tenants or otherwise, and were informed that she was not so in possession and had no claim to the property. On the trial, the plaintiff introduced evidence tending to prove, in substance, the following: Plaintiff purchased the property in question in 1877, and subsequently made valuable improvements upon it, she and her tenants being in possession. Hitchens, by false and fraudulent representations of impending litigation, sought to persuade her to put the title to the property temporarily in him. To this end he prepared a "note of obligation," "the substance of which was that he would restore the property to plaintiff upon the conclusion of the threatened litigation," as well as his promissory note for two thousand seven hundred dollars, and desired plaintiff to make him a deed to the property. Instead of following exactly this plan, plaintiff and Hitchens went to the office of an attorney, where Hitchens handed plaintiff the promissory note and she executed a deed conveying the property to Hitchens. This deed she delivered to the attorney with the express understanding and agreement of all three that he "should hold the deed until Hitchens paid the money." It was also understood between plaintiff and Hitchens that there was never to be any payment upon the note or any delivery of the deed. Plaintiff had agreed to go with Hitchens to Texas as his housekeeper, and within a day or two after the delivery of the deed to the attorney she was sent to New Orleans by Hitchens, he following three days later. Before leaving Atlanta, plaintiff instructed Hitchens to place her property in the hands of a renting agent, which he did. One of her tenants was left in one of the houses upon the place. Between the time of plaintiff's arrival in New Orleans and the time when Hitchens joined her there, she received two letters, signed with the name of a friend of hers in Atlanta but in fact sent by Hitchens, falsely stating that there was trouble in regard to her property and that some of her furniture had been attached, and advising her to follow the advice of Hitchens in the matter. When Hitchens reached New Orleans, he took from plaintiff, by force and against her will, ⁴⁶⁴ the "note of obligation" and the promissory note and then returned to Atlanta. Plaintiff followed him to Atlanta, and called upon the attorney with whom the deed had been deposited. She asked where she could find Hitchens, and told of the theft of the papers. The attorney said that he was very sorry, that Hitchens had "given him five dollars as a fee if anything should come up," and that he could do nothing for her. She found Hitchens, and he prom-

ised to return the stolen papers if she would go to New Orleans, and shortly afterward, in that city, he executed a paper and gave it to her together with her "title papers." She could not read and did not know the nature of the paper Hitchens signed, but it looked like a deed, and she was told, if she would record it, her property would be all right. Subsequently, in Texas, when she, at the instance of Hitchens, put the papers in her trunk, the trunk was broken open and the papers stolen. In August, 1891, plaintiff went to Danville, Virginia, where she remained until December, and then first learned that her property had been mortgaged. She came directly to Atlanta and employed attorneys to protect her rights. While in Texas she had received through Hitchens some of the rent due on her place, but nothing was ever paid her on the promissory note or as the purchase money of the property. The deeds from her vendor to herself, from her to Hitchens, from Hitchens to the Bristol Savings Bank, and the mortgage from Hitchens to Barker, were introduced in evidence. Also certain letters and telegrams. At the close of the plaintiff's evidence, the trial judge awarded a nonsuit as to Barker and the bank, and to this ruling plaintiff excepted.

1. "Although it is well settled that an escrow delivered without authority, or obtained fraudulently, passes no title to the grantee or obligee, there is some conflict of opinion as to the right of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions; but the better opinion seems to be, that such a purchaser acquires no title": 6 Am. & Eng. Ency. of Law, 1st ed., 869. See cases cited in note 3. "When the instrument has been placed in the hands of the depositary, the grantee is not entitled to it, nor does he acquire any rights under it, until he has performed ~~465~~ the conditions upon which the depositary is to deliver it to him": Devlin on Deeds, sec. 321. "Until the condition has been performed and the deed delivered over, the title does not pass, but remains in the grantor. . . . If the depositary deliver the deed without authority to do so from the grantor, or if the grantee obtain possession of it fraudulently, without performing the condition, the deed is void. The deed thus obtained conveys no title either to the grantee or purchasers under him": Devlin on Deeds, sec. 322, and cases cited in note 4. "To maintain the plea of an innocent purchaser, a person must have acquired the legal title, which he seeks to protect against some latent equity of charge on the land. Hence this plea cannot avail a person who has bought on the faith of the possession of the escrow by

the person named therein, where such possession has been obtained wrongfully. The conveyance made by the grantee in the escrow cannot affect the legal title, for that remains in the grantor or his heirs. And as the equities of such purchaser and those of the heirs of the original grantor are equal, the legal title which is vested in such heirs must prevail": Devlin on Deeds, sec. 323.

In the leading case of *Evarts v. Agnes*, 6 Wis. 453, 4 Wis. 343, 65 Am. Dec. 314, it was held that: "The fraudulent procurement of a deed deposited as an escrow, from the depository by the grantee named therein, will not operate to pass the title; and a subsequent purchaser from such grantee, without notice and for a valuable consideration, derives no title thereby, and will not be protected." The reasoning is, that a delivery is essential to the vitality of a deed. The grantor must consent that the deed shall pass irrevocably from his control. It is this consent, express or implied, which gives the instrument efficacy. If there be a conditional delivery, by placing the instrument in the hands of a third person as an escrow, the condition must be strictly complied with before such delivery becomes effectual. Obtaining the instrument from the depository by fraud, larceny, or any means other than the performance of the condition, is against the assent of the grantor; and as such assent is necessary to a delivery, and a delivery to the validity of the deed, the grantee gets no title and can convey ⁴⁰⁶ none. In the case we have under consideration, the uncontradicted testimony is to the effect that the grantor placed the instrument in the custody of the depository with express instructions to him to deliver it to the grantee upon the payment, by the grantee to the grantor, of a certain note given by the former to the latter, and that the grantee fraudulently procured possession of the instrument from the depository without paying the note, the depository being entirely innocent of any wrong or bad faith. If this be the truth of the case, we have no hesitancy in holding that the instrument passed no title, either to the grantee, or to an innocent purchaser from him. The fact that the instrument was not technically an escrow, because of a secret understanding between the grantor and grantee that the note was never to be paid and that the instrument was never to be delivered (there being no negligence or fraudulent design on the part of the grantor), does not alter the principle of the ruling above announced, but rather strengthens the argument that no title passed from the grantor,

because she never intended that the instrument should be legally executed by a delivery to the grantee.

While it is true that the fraud of his grantee in procuring a conveyance cannot be set up by the grantor to defeat the title of a subsequent bona fide purchaser from such grantee, because of the consent of the grantor to the execution and delivery of the conveyance, thus passing the title, yet that is not the case we have to consider. There is evidently a fundamental distinction between a case where, by fraudulent representations, a grantor is induced to execute and deliver a deed, and one where the instrument is obtained from a depositary without the knowledge or consent of the depositor, or compliance with the conditions on which the delivery depends. In the former case, the act of the grantor is voluntary, and no matter what deception may have induced him to execute the conveyance, an innocent third person should not be made to bear the misfortune of the grantor or to suffer for his credulity. In the latter case, there is no assent of the grantor, consequently no delivery, and title never passes from him: See *Everts v. Agnes*, 6 Wis. 453; 4 Wis. 343; 65 Am. Dec. 314. If a deed delivered in escrow be fraudulently ⁴⁶⁷ abstracted from the depositary by the grantee, without performing the conditions on which it was to be delivered to him, it is void even in the hands of a bona fide purchaser: *Jackson v. Lynn*, 94 Iowa, 151; 58 Am. St. Rep. 386. In the case at bar, according to the evidence submitted, Thomas, the depositary, was the special agent of petitioner, authorized by her to do one specific act, strictly ministerial in its character—that is, to deliver the instrument to Hitchens upon the payment of the note by him to petitioner. By the express and unequivocal instructions of his principal, this special agent only had authority to deliver the instrument upon the payment of the note, and a delivery in disregard of such instructions, induced by the fraud of the grantee practiced upon such agent, did not bind the principal, the evidence showing no negligence upon her part. A principal is bound only by the authorized acts of his agent. When Thomas, the special agent of petitioner, delivered the instrument to Hitchens before the payment of the note, the event which she had prescribed as a condition precedent to the delivery, it was an unauthorized act of such agent and a nullity as to petitioner. The instrument never became her deed, because it lacked one of the requisites of a valid deed—a delivery by the grantor or by some one authorized by her. The equitable rule, that where one of two innocent parties must suffer,

he whose act has caused the loss must bear it, we do not think applies, in view of the evidence submitted in this case. There is no more equity in favor of the defendants, the bank and Barker, as innocent purchasers, than there is in favor of petitioner, whose special agent was fraudulently induced by Hitchens to deliver the instrument to him without his having complied with the condition precedent to a delivery, prescribed by petitioner; and their equities being equal, the legal title which remained in petitioner must prevail: Devlin on Deeds, sec. 323, and cases cited in note 1. See *King v. Sparks*, 77 Ga. 285; 4 Am. St. Rep. 85.

2. Where an escrow has been improperly delivered or obtained from the depository by fraud, the grantor may ratify the delivery. An express ratification is not necessary; for ratification may be presumed where the grantor has recognized ⁴⁶⁸ the validity of the delivery, or where he has remained silent when called upon to speak and others have been injured. His conduct may be such as to create an estoppel in pais as to bona fide purchasers from the grantee: *Cotton v. Gregory*, 10 Neb. 125; 19 Am. Law Reg. 694; *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611. In order that a ratification should be binding, it must have been made with a full knowledge of all the material facts: *State v. Southwestern R. R. Co.*, 70 Ga. 12 (3, a); *De Vaughn v. McLeroy*, 82 Ga. 700, and cases cited at bottom of page. In the present case, there is no evidence of an express ratification by the grantor of the delivery to Hitchens. Whether plaintiff's acts were such as to raise a presumption of ratification was, under the evidence submitted, a question for the jury. From the loss of most of the papers relating to the matters in dispute, the illiteracy of the plaintiff, and other causes, the evidence on the question of ratification or estoppel is not at all definite, and the inferences to be drawn from it should have been left to the jury: See *Burr v. Howard*, 58 Ga. 564. Where reasonable men might differ as to the inferences to be drawn from certain evidence, the matter should be left to the jury although there may be no conflict in the evidence. And, under section 5347 of the Civil Code, a nonsuit should be granted only where "all the facts proved and all reasonable deductions from them" do not entitle plaintiff to recover. In the present case, the jury might have thought that the meager evidence relating to the matter did not warrant a finding that there had ever been a ratification by the plaintiff. Further, we think that, in the absence of an express ratification, the defendants should have been required

to show that they had been injured by plaintiff's silence, inaction, or acquiescence, before a ratification of the wrongful delivery could be presumed against her. The grant of the nonsuit cannot, therefore, be sustained upon the theory that the evidence showed a ratification by the plaintiff.

3. It was contended that, as the depositary was the attorney of the grantee, the deed could not be delivered to him as an escrow; that the result of an effort to do so would be to vest the title immediately in the grantee. In support of this contention was cited the case of *Duncan v. Pope*, 47 Ga. 445, where ⁴⁶⁹ it was held: "A grantor cannot deliver a deed to the grantee, or his attorney, as an escrow. Such a delivery would be equivalent to adding a parol condition to the instrument. To make the deed an escrow, it should be delivered to a third person, to be by him delivered to the grantee upon the performance of any required condition." This language, we think, was not intended to apply to cases like the present. It meant that a delivery to the agent or attorney of the grantee, employed to obtain possession of the instrument or to make the purchase for the grantee, was tantamount to a delivery to the grantee. This we think is true, but the agency must include the very matter of obtaining the conveyance for the grantee. The rule laid down applies where the delivery is made to the agent of the grantee as such agent, but has no application where the depositary is, though an agent or attorney of the grantee, yet not an agent to procure the conveyance and the delivery is to him as agent of both parties. "The delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee": *Watkins v. Nash*, L. R. 20 Eq. Cas. 262. "The mere delivery of manual possession of the deed is not necessarily a delivery of the deed; and in cases where the acceptance of an agency from both involves no violation of duty to either, it is competent for the releasor to make the agent of the releasee his own agent for the purpose of holding the deed as an escrow, and returning it to him, the releasor, in case of nonperformance of a stipulated condition. There is no such personal identity between the releasee and his agent as to preclude the latter from becoming the depositary of an escrow": *Cincinnati etc. R. R. Co. v. Iliff*, 13 Ohio St. 235; *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37.

In a broad sense, every depositary of an escrow is the agent

of both parties. For the purpose of making delivery upon the performance of the conditions, he is no less the agent of the grantee than the agent of the grantor: *Everts v. Agnes*, 6 Wis. 453; 4 Wis. 343; 65 Am. Dec. 314; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235. In the present case, Hitchens gave the depositary a small fee to represent him in ⁴⁷⁰ case "anything should come up." It does not appear that the attorney represented Hitchens in procuring the execution of the deed; nor that the grantor, at the time of the delivery of the deed to the depositary, knew that the latter had been employed to represent Hitchens; nor even that he was so employed prior to that time. The evidence was not such that the trial judge could properly assume that the deed was delivered to the attorney as agent of the grantee. The evidence seems to indicate that the contrary is true, and that the intention was to make the attorney the depositary of the escrow, to hold it until the performance of the condition and then to deliver it to grantee—to make the attorney, as to this matter, the agent of both parties. Certainly, the evidence is sufficient to warrant such a finding by the jury, and the question should have been submitted to them.

4. The presumption of delivery, raised by the facts that the deed to Hitchens was given into his possession and that it had been recorded, was rebutted by evidence that the deed had been placed in the custody of a depositary, to be delivered only upon the performance of certain conditions, and that, through the fraud of the grantee, the delivery had been made without such performance. It seemed, therefore, that no title passed to the grantee and he could pass none to purchasers from him. Such purchasers, claiming under the grantee, could not be protected unless it were shown either that the improper delivery of the deed had been in some way ratified by the grantor, or that the depositary was the agent of the grantee to procure the conveyance, so that the delivery to him was in effect a delivery to the grantee. The question of possession is therefore not here material. If, however, the purchasers rely for protection upon acts of the grantor which would estop her to set up her title against them—an estoppel in pais amounting to a ratification—they will have to show that they acted in good faith.

Judgment reversed.

All the justices concurring.

DEEDS—ESCROW—FRAUDULENT DELIVERY.—If a deed placed in escrow is fraudulently and wrongfully obtained from the depositary, without performance of the conditions attached to its

delivery, it is void in the hands of a bona fide purchaser, unless it is pleaded and shown that the grantor was so negligent, careless, and inattentive of the rights of others as to estop him from claiming title against such purchaser: *Jackson v. Lynn*, 94 Iowa, 151; 58 Am. St. Rep. 386. See, also, *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314. Compare notes to *Weber v. Christen*, 2 Am. St. Rep. 73; *Everts v. Agnes*, 65 Am. Dec. 324, for other views. The depository of an escrow is as much the agent of the grantee as of the grantor. If he delivers the escrow before the proper conditions have been performed, he cannot be said to have done so as the agent of the grantor. To obtain an escrow from a depository without performing the conditions upon which it was to be delivered is as much against the assent of the grantor as it would be to take it from the desk or drawer, where the grantor had deposited it, without his knowledge or consent: *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314, and note.

AGENCY—RATIFICATION OF UNAUTHORIZED ACTS.—A principal may ratify the unauthorized acts of his agent, either expressly or by acquiescence, or even by silence, after being fully informed: Note to *Ward v. Williams*, 79 Am. Dec. 387; *Szymanski v. Plassan*, 20 La. Ann. 90; 96 Am. Dec. 382; *Taylor v. Conner*, 41 Miss. 722; 97 Am. Dec. 419. One who ratifies the fraudulent act of another, thus making it his own, is answerable therefor: *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32.

NONSUIT—GRANTING OF.—A nonsuit should not be granted if there is any evidence upon which a verdict could be rendered: *Tison v. Yawn*, 15 Ga. 491; 60 Am. Dec. 708; note to *Phillips v. Brigham*, 71 Am. Dec. 229; *O'Brien v. Miller*, 60 Conn. 214; 25 Am. St. Rep. 320. A nonsuit should be granted if, admitting all facts proved and all reasonable deductions from them, the plaintiff on all the proof, ought not to recover: *Tison v. Yawn*, 15 Ga. 491; 60 Am. Dec. 708.

O'BRIEN v. SPALDING.

[102 GEORGIA, 490.]

WILLS—EXECUTION OF—ATTORNEY AS A COMPETENT WITNESS—PRIVILEGED COMMUNICATIONS.—If an attorney at law is employed by a testator to draft a will, he may, after the testator's death, and when the will is presented for probate, testify as to what occurred at the time of its execution, without violating the policy of the law which forbids privileged communications between attorney and client from being disclosed to the injury of the client, conceding that this relation existed between the attorney and the testator at the time of the execution of the will.

WILLS—EXECUTION—ATTORNEY AS A COMPETENT WITNESS — PRIVILEGED COMMUNICATIONS — STATUTE.—When a will is offered for probate, the existence of a statute declaring that, "No attorney shall be competent or compellable to testify, in any court in this state, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney," does not render incompetent the testimony of an attorney at law, who prepared the will and signed it as one of the attesting witnesses, where he is called upon to state what occurred at the time of the execution of the will, as the attorney, in such a case, is not testifying "for or against his client," or for or against the interests of the client's estate.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—PURPOSE OF COMMON-LAW RULE.—The purpose of the common-law rule, declaring that communications between attorney and client are privileged, is to protect the client, and strangers cannot invoke this rule in their own behalf. Hence those who claim under a testator, but not adversely to him, and who seek an investigation into the circumstances attending the execution of his will, cannot invoke this rule.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—TESTAMENTARY DISPOSITIONS.—The common-law rule declaring that communications between attorney and client are privileged does not apply to testamentary dispositions, as the purpose of investigating the circumstances attending the execution of a will is to do full and complete justice, not only to the living, but to the dead.

WILLS—EXECUTION OF—COMPETENCY OF ATTORNEY WHO DRAFTED WILL AND SIGNED IT AS AN ATTESTING WITNESS.—An attorney at law who drafts a will and signs it as a witness is competent, when the will is offered for probate, to testify as to the testator's mental condition, the latter's knowledge or ignorance, of the contents of the paper, and as to what was done at the time of its execution.

WILLS—EXECUTION OF—WITNESS—COMPETENCY OF ATTORNEY CONSULTED AS A FRIEND.—If an attorney at law is consulted, with respect to a testamentary disposition of property, in the capacity of a friend, and not as a legal adviser, is nominated executor, and he makes and delivers to another person a memorandum from which a will is subsequently drafted by the latter, there is no relationship of attorney and client between the attorney and the testator as to the preparation of the will, and the attorney is a competent witness as to what occurred at the time of such consultation.

WILLS—EXECUTION OF—ADMISSIBILITY OF IN EVIDENCE, WHEN ATTESTED BY THREE COMPETENT WITNESSES.—A paper purporting to be a will and signed by three attesting witnesses is admissible in evidence as a will, under a statute requiring that it shall have at least three competent witnesses, although one of the witnesses was an attorney at law, who prepared the paper and signed it as an attesting witness at the request of the testator.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—WAIVER OF PRIVILEGE BY CLIENT.—A client is not permitted, under the statute of Georgia, to waive the protection afforded to him by the rule concerning privileged communications.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—THE TEST by which to determine whether a communication is or is not privileged, under the Georgia statute, is, How did the matter or thing claimed to be privileged become known to the witness? If by virtue of his relations as attorney, he cannot testify; but he can testify where he has acquired knowledge thereof in any other manner.

WILLS—VALIDITY OF—LEGAL KNOWLEDGE IS NOT ESSENTIAL TO.—It is not essential to the validity of a will that the testator should comprehend its provisions in their legal form, or that he should be skilled in the law. It is sufficient if he understands the disposition made of his property, especially where it appears that the instrument signed by the testator was read over to him by the attorney who drafted it, that its legal terms and its practical effect were fully explained to him, and he stated, un-

equivocally, that he fully understood its provisions, and that they were in accord with his wishes.

NEW TRIAL—NO ABUSE OF DISCRETION IN DENYING, WHEN.—There is no abuse of discretion in refusing to grant a new trial where the evidence, though conflicting, warranted the verdict.

Probate of a will. A paper was offered, by Spalding, as executor, for probate as the will of Catherine T. Flynn. Caveats were filed by O'Brien and others, her heirs at law, upon the ground that, at the time of making the pretended will, she was not of sound and disposing mind and memory; that it was not her will, because not freely and voluntarily executed by her; that she was led to believe that the paper signed by her was her will, when, in truth, it was another and entirely different one, which she knew nothing about; and that it was procured by misrepresentation and fraud. The jury found for the propounder, and a motion by the caveators for a new trial was overruled, and they appealed.

John L. Hopkins & Sons, Payne & Tye, and J. F. O'Neill, for the appellants.

N. J. & T. A. Hammond, and J. T. Pendleton, for the appellee.

492 FISH, J. 1. The record before us discloses that Mr. King, an attorney at law, drafted the instrument offered for probate as the will of Mrs. Flynn, called in person upon her at her home in order that he might read the paper over to her and explain its legal effect, and was subsequently present when she signed it, assisting in and supervising the execution and attestation of the instrument, which he himself signed as one of the attesting witnesses. Whether, under the peculiar circumstances attending and leading up to Mr. King's connection with this matter, the relation of attorney and client existed between him and Mrs. Flynn, is a question as to which the parties are at issue. We shall, however, in dealing with certain other contentions on the part of the plaintiffs in error, based upon the idea that Mr. King was acting professionally in all that he did in Mrs. Flynn's behalf, assume this to be the truth of the matter, and thus give the plaintiffs in error the benefit of any doubt there may be in regard thereto. This course will not, on the other hand, be unfair to the defendant in error; for, as we shall endeavor to show, there is no merit in the plaintiffs' contentions above alluded to, even conceding the premise in dispute.

Complaint is made that, on the trial of the present case, Mr.

King was introduced as a witness in behalf of the propounder of the paper offered for probate, and was allowed, over objections, to testify concerning its execution by Mrs. Flynn, as to her mental capacity to make a will, and as to what passed between them when he read over to her and explained the meaning of the instrument he had prepared for her to sign. It is contended by counsel for the plaintiffs in error that as Mr. King sustained toward the testatrix the attitude of attorney ⁴⁹³ and confidential adviser, he was an incompetent witness to testify concerning any facts or circumstances, knowledge of which he had gained while attending to his professional duties in the premises. We do not, however, understand the law to be that the plaintiffs are at liberty to urge this objection. The purpose of the common-law rule declaring that communications between attorney and client are privileged is to protect the client: *Greenough v. Gaskell*, 1 Mylne & K. 98, 103. Strangers are not at liberty to invoke this rule in their behalf. Accordingly, it was early decided in England that: "In a suit by next of kin of a testator, challenging a residuary gift made by his will to the executors, on the ground that it was made on a secret trust for an illegal purpose, . . . communications had between the testator and the solicitor employed by him to prepare the will, with reference to the will and the trusts thereof, were not privileged": *Russell v. Jackson*, 8 Eng. L. & Eq. 89, 15 Jur. 1117; 9 Hare, 387. The correctness of this position has received the unqualified recognition of the supreme court of the United States: *Blackburn v. Crawford*, 3 Wall. 176. Indeed, the doctrine laid down by the English courts appears to have become the firmly established law of this country: *Graham v. O'Fallon*, 4 Mo. 338; *Layman's Will*, 40 Minn. 371; *McMaster v. Scriven*, 85 Wis. 162; 39 Am. St. Rep. 828; *Scott v. Harris*, 113 Ill. 447; *Doherty v. O'Callaghan*, 157 Mass. 90; 34 Am. St. Rep. 258. In the case last cited, Lathrop, J., in pronouncing the opinion of the court, said: "Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." In our investigation of this question, we have encoun-

tered numerous other authorities to the same effect, some of which may readily be found by reference to Wharton on Evidence, section 591, and 19 American and English Encyclopedia of Law, 142. It would ⁴⁹⁴ be unprofitable, however, to attempt to further sustain the position above announced by the citation of additional cases more or less in point, for the reason that counsel for the plaintiffs in error, in their written argument presented to this court, very frankly say: "By weight of authority under the common law, it was held that the reason of the general rule does not apply to communication made to an attorney by a testator while giving instructions for drafting a will; that the protection which the rule gives and is intended to give is the protection of the client, and that it cannot be said to be for the interests of a testator, in a controversy between other parties, to have those declarations excluded which are relevant and which were necessary to the proper execution of his will. . . . In other words, we concede the proposition that under the common law the courts have held that an attorney can testify as to what occurred between him and the testator, and that it does not violate the policy of the law which gave birth to the rule." The real contention of counsel is, that the common-law rule in regard to privileged communications between attorney and client no longer obtains in Georgia, but has been changed by statute. The act relied on is that of August 4, 1887, which is now embodied in section 5271 of the Civil Code, and reads as follows: "No attorney shall be competent or compellable to testify in any court in this state, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner." We are at a loss to perceive how the language employed in this statute can be construed as containing any intimation that it was designed to protect persons other than the client himself, and that therefore a stranger could invoke it in his behalf in a controversy to which the client was not even a nominal party. While the terms of this act may not be couched in the precise phraseology in which the common-law rule is usually stated, still any assumption that the legislature thereby intended to inaugurate ⁴⁹⁵ and declare an entirely new and radically different policy in the respect just indicated, must necessarily rest solely upon pure conjecture.

In *Freeman v. Brewster*, 93 Ga. 653, the act of 1887 was construed to mean what it in terms says, viz., that an attorney is incompetent to testify "for or against his client"; and it was accordingly said the statute had no application to a case in which the client himself was not before the court as a party at interest. To the present controversy, Mrs. Flynn, the "client," is neither a party plaintiff nor a party defendant. "In no sense of the word can the testatrix be called the 'other party,' in opposition to either the propounder or the caveators," in such a proceeding: *Brown v. Carroll*, 36 Ga. 570. Nor can it be said that, in a controversy of this nature, the attorney drafting the will is called upon to testify "for or against" the interests of his client's estate. On the contrary, the proceeding is simply one in which certain persons claiming under, and not adversely to, the "client" seek to have an investigation made into the circumstances attending the execution of the instrument offered for probate, in order that their rights in the premises may, as against the persons represented by the propounder, be finally adjudicated. It is a proceeding provided for and sanctioned by law, in which it is necessarily contemplated that the whole truth shall be elicited from every reliable source, to the end that full and complete justice may be done, not only to the living, but to the dead.

2. Objection was also raised to the competency of the propounder, Mr. Spalding, when offered as a witness in his own behalf. It appears that on various occasions, during a period of several years prior to the execution of the will, he had acted as the attorney and counselor of Mrs. Flynn. On the day the will was signed, she sent for him with a view to having him prepare the instrument. He called at her house, and was then told she wished him to become her executor. He demurred at first, but finally consented that he should be so nominated, at the same time declining, however, to act as her attorney in drafting the will, or in advising her in regard thereto, or in supervising its execution. He suggested that she procure his ⁴⁹⁰ partner, Mr. King, to perform this office, and she consented to this arrangement. Thereupon, acting in the capacity of friend and not as her legal adviser, he consulted with her as to her wishes in respect to the disposition of her property, made the memorandum from which the will was subsequently drafted, and delivered the same to Mr. King with the request that he act for Mrs. Flynn in the matter. Under the circumstances above recited, we have no hesitation in saying that, so far as the prep-

aration of her will is concerned, the relation of attorney and client did not exist between her and Mr. Spalding. "Although consulted by a friend, because he was an attorney, yet he refused to act as such, and was therefore only applied to as a friend" in the consultation which followed between him and Mrs. Flynn, in which he took part only upon the express understanding that he should be so regarded: Story's Equity Pleading, 9th ed., sec. 602; 1 Greenleaf on Evidence, sec. 244. "The true principle in reference to privileged communications between attorney and client is, that where the attorney is professionally employed, any communication made to him by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication. . . . But to set the privilege in operation, the professional relation must exist, and some kind of professional employment is necessary. . . . So where the attorney is consulted merely as a friend and not in a professional character, and neither the attorney nor the person consulting supposes the professional relation to exist between them," or where a communication is "voluntarily made to counsel after he has refused to be employed by the party making it," the rule first above stated has no application: Weeks on Attorneys, sec. 153. This distinction is unquestionably recognized and clearly expressed by our statute.

Obviously, therefore, there is no merit in the contention of counsel for plaintiffs in error that Mr. Spalding was an incompetent witness concerning anything that occurred at the interview he had with Mrs. Flynn on the morning of the day she executed her will, even were the plaintiffs in error at liberty to urge this objection. As to the interview with Mrs. Flynn, some ⁴⁹⁷ two years previously in the presence of other persons, testified to by the witness, it may be remarked that there is abundant and respectable authority to the effect that testimony in regard to what then transpired should not be considered as coming within the rule relating to privileged communications. But be this as it may, we are of the opinion that, for the reasons stated in the first division of this opinion, the trial judge did not err in admitting any of the evidence in this connection to which objection was offered.

3. Still another exception taken alleges error on the part of the trial judge in admitting in evidence the paper offered for probate as the will of Mrs. Flynn, "to the reception of which caveators objected on the ground that it had not been attested

nor properly proved by three competent witnesses, as required by law—A. C. King being incompetent as a witness to attest or prove it because of the relation of attorney and client between himself and Mrs. Flynn.” If the objection urged be meritorious, this is a matter of which advantage may be taken by the plaintiffs in error, for although it is not their right to object to testimony given in this particular litigation by Mr. King, still if, as contended, he was an incompetent attesting witness at the time the will was executed, it never became a valid instrument, because attested by only two other persons, whereas our statute requires that there shall be at least three competent attesting witnesses to every will. We shall therefore deal with the question presented as if Mrs. Flynn herself were in life and sought to attack the validity of an instrument signed by her, on the ground that her attorney was an incompetent attesting witness thereto, and accordingly it had not been attested by the number of witnesses prescribed by law.

The practice of attorneys attesting deeds, wills, and like instruments, which they have drafted in accordance with instructions received of their clients, to be executed by the latter, has certainly long prevailed, both in England and in this country. It is equally certain that at common law attorneys have always been considered competent so to do: *Doe v. Andrews*, 2 Cowp. 846. And accordingly it was held by the supreme court of South Carolina, in a somewhat recent case, that: “An attorney ⁴⁹⁸ who signs his name as a witness to the execution of a mortgage prepared by himself may be called upon to testify as to what occurred at the time of such execution”: *Monaghan Bay Co. v. Dickson*, 39 S. C. 146, 149; 39 Am. St. Rep. 705, citing a number of pertinent authorities. For the rule regarding privileged communications cannot properly be said to apply where an “attorney, having made himself a subscribing witness and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with his client, or on his client’s behalf, matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know”: 1 Greenleaf on Evidence, sec. 244; Story’s Equity Pleading, 9th ed., sec. 602. Counsel for the plaintiffs in error suggest that all of these authorities proceed upon the theory that, in assenting to the exe-

cution of a will or other instrument by his attorney, a client "waives" all right to thereafter invoke in his behalf the rule in regard to privileged communications, so far as that particular transaction is concerned. In support of this position, a number of New York decisions were cited, among them, *In re Will of Coleman*, 111 N. Y. 220, wherein a statute of that state (providing, in effect, that all communications between attorney and client are privileged and cannot be divulged "unless with the consent of the client") was under consideration. It seems that the courts of New York have construed this statute to cover every kind of a communication, including instructions as to the drafting of a will; and unless the consent of the client to the disclosure thereof be secured while he is in life, the right to unseal the lips of his attorney dies with him, and can never thereafter be exercised. In order that this construction may not lead to embarrassment in a proceeding where a will is offered for probate, it is held that where a testator assents to his attorney attesting a will, this amounts to a full waiver and the demands of the statute are satisfied. Following up this line of argument, counsel then undertake in their brief to point out ⁴²⁰ that none of the various statutes on this subject of force in Georgia prior to 1887 were "simply declaratory of the common-law doctrine," and conclude by saying that "therefore all authorities cited—coming from other states or England—have no bearing upon this question, which is to be determined solely by the statute law of this state. Under the statute of 1887, a waiver of the privilege by the client is a legal impossibility, because it was never contemplated by the law-making power; and that is very clearly shown in the case of *Lewis v. State*, 91 Ga. 168."

We quite agree with the counsel in this construction of the act of 1887. What may or may not have been the effect of prior statutes is now immaterial. Granting that none of them were "simply declaratory of the common-law doctrine," it by no means follows that, after numerous statutory experiments and blunders, we have not finally, by our latest enactment, returned to the sound policy upon which that doctrine was based. Nor do we understand that the decisions above referred to, with the single exception of those construing the New York statute, proceed upon the idea that a client by procuring the signature of his attorney as an attesting witness, "waives" the right to object to "privileged communications" being thereafter offered in evidence in a controversy respecting the transaction to which the client is a party. On the contrary, the real question at issue

was, whether communications made under such circumstances were "privileged"—not whether, conceding them to be so, the client had "waived" all right to protection in regard thereto. In other words, it has been held, and we think correctly, that a client cannot truthfully and honestly claim that he understood such communications to have been received by his attorney professionally, and under the seal of confidence, when the services of the latter as an attesting witness were avowedly rendered and accepted with a view to enabling him to testify in the event he might thereafter be called upon to do so. This certainly is the understanding sought to be conveyed by the extracts we have quoted from Greenleaf and Story.

By no means is a client permitted, under our statute, to waive the protection it affords. The act of 1887 is clear upon ⁵⁰⁰ this point. But this fact is not helpful in determining what really are, or are not, "privileged communications." The determination of this question must necessarily depend upon the circumstances under which the particular "matter or thing" claimed to be privileged came to be known to the witness. If "by virtue of his relations as attorney," he may not testify; otherwise, if "he may have acquired in any other manner" knowledge thereof. This is the test which our statute prescribes.

While a client has no power to waive his right to exclude this sort of incompetent testimony, still the law leaves it largely to him to render information which he imparts competent or incompetent as evidence to be used "for or against" him. For instance, a person may decline altogether the services of an attorney, or may employ him to attend to various different matters. A client may likewise confine his attorney's professional zeal to one branch only of a single subject matter, or to a specified act in connection with a particular transaction. Evidently, in the present instance, Mrs. Flynn did not contemplate that her counselor should belong absolutely to her, body and soul, from the moment he entered her house up to his departure therefrom; nor could she have understood, under the circumstances, that everything he might hear or see while there would be forever locked under the sacred seal of confidence. On the contrary, she accepted his services as an attesting witness, doubtless under the belief and with the desire that, if ever called upon after her death, he would conscientiously and truthfully testify to everything that then and there occurred in connection with the execution of her will. That he has undertaken to

do so involves no breach of propriety even. Certainly, the policy our statute was intended to subserve has not been defeated. It follows that if Mr. King was competent to testify to such matters as could properly be elicited from either of the other attesting witnesses, his signature to the instrument has the same legal effect as would that of a person whose competency to attest a will was beyond question. This being so, the paper offered in evidence could not be attacked on the ground of his alleged incompetency to ⁵⁰¹ attest it. Whether, on the trial now under review, he may have been permitted to go further in his testimony than he would have been authorized to do in a proceeding to which his client was a party, is utterly immaterial. Suffice it to say he was at liberty to testify to everything essentially material to the inquiry whether the paper offered for probate was really the will, duly executed, of a person capable under the law of disposing of her property.

4. Another source of complaint is that the trial judge instructed the jury: "It is not necessary that he [the testator] should comprehend the provisions of his will in their legal form, or that he should be skilled in the law. It is sufficient if he have such mind and memory as to enable him to understand the elements of which it is composed, and the disposition of his property in its simplest form." The language above quoted is almost identically the same as that used in a charge in the case of *Stancell v. Kenan*, 33 Ga. 56, 64, which this court pronounced free from error. Read in connection with its immediate context, we are unable to perceive how the jury could possibly have failed to understand the instruction to which objection is made. But even were it open to serious criticism, we would not feel warranted, in the present case, in setting the verdict aside on this ground alone. It appears by uncontradicted evidence that the instrument signed by Mrs. Flynn was read over to her by the attorney who drafted it, that its legal terms and its practical effect were by him fully explained, and that she stated unequivocally to him that she fully understood its provisions and that they were in accord with her wishes.

5. The vital issue in the case was whether the testatrix was mentally capable of intelligently making a disposition by will of her property. Upon this vital point, as well as upon incidental issues involved, the evidence was conflicting. The jury were, however, fully warranted in returning a verdict in favor of the propounder; and consequently, we are not prepared to say there

was any abuse of discretion on the part of the trial judge in refusing to grant a new trial.

Judgment affirmed.

All concurring, except Atkinson, J., absent.

NEW TRIAL.—There is no error in denying a new trial, where the evidence warrants the verdict: *Corniff v. Cook*, 95 Ga. 61; 51 Am. St. Rep. 55.

Attorneys as Witnesses.*

Employment of Attorney.—It is well understood that an attorney, counselor, or solicitor is not permitted to testify as to communications made to him in his professional character by his client, unless the client consents. In other words, a counsel or attorney is not a competent witness as to facts communicated to him by his client, in the course of the relations subsisting between them: *Chirac v. Reinicker*, 11 Wheat. 280; *Nelson v. Becker*, 32 Neb. 99; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *Denver Tramway Co. v. Owens*, 20 Colo. 107; *Carter v. West*, 93 Ky. 211; *Oliver v. Pate*, 43 Ind. 132; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Beltzhoover v. Blackstock*, 27 Am. Dec. 330; *Bean v. Quimby*, 5 N. H. 94; *Turquand v. Knight*, 2 Mees. & W. 98; *Austin v. Helser*, 6 S. Dak. 429; *Sloan v. Wherry*, 51 Neb. 703; *Rhoades v. Selin*, 4 Wash. C. C. 715, 718; *Holmes v. Barbin*, 15 La. Ann. 553; *Yordan v. Hess*, 13 Johns. 492; *Higbee v. Dresser*, 103 Mass. 523; *King v. Barrett*, 11 Ohio St. 261; *Marks v. Lahee*, 4 Scott, 155; *Richards v. Jackson*, 18 Ves. 472, 474; *Hughes v. Boone*, 102 N. C. 137; *Aiken v. Kilburne*, 27 Me. 252; *March v. Ludlum*, 3 Sand. Ch. 35, 46; *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513; but there is some difference of opinion as to the precise limits of this general rule. For instance, it was, for a long time, a question whether the privilege that a client has of not permitting his attorney to reveal matters intrusted to the latter in professional confidence was to be extended to all cases of professional engagement, or only to a case of employment for conducting a cause. There is also some uncertainty as to the true limit between employment as an attorney and as an agent; and there have been different opinions upon the question whether the rule is to be applied only to communications made by the client to his attorney, or whether it extends to a knowledge of the existence, contents, and situation of instruments and writings, which has been acquired by the attorney in the course of professional engagement. We shall, therefore, endeavor in this note to show what constitutes a privileged communication, what the law is upon the controverted questions mentioned, and when an attorney may be compelled to testify as to matters with which his client has been connected.

It is now well settled that all communications made by a client to his attorney, counsel, or solicitor, for the purposes of professional advice or assistance, are privileged, whether such advice relates to

*REFERENCE TO MONOGRAPHIC NOTES.

Confidential communications: 36 Am. Rep. 631-632.

a suit pending, one contemplated, or to any other matter proper for such advice or aid: *Britton v. Lorenz*, 45 N. Y. 51, 57; *Williams v. Fitch*, 18 N. Y. 546, 551; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Carter v. West*, 98 Ky. 211; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Gage v. Gage*, 13 N. Y. App. 565; *McMannus v. State*, 2 Head, 213; *Beltzhoover v. Blackstock*, 3 Watts, 20; 27 Am. Dec. 330; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 406; *Minet v. Morgan*, L. R. 8 Ch. App. 361, 368; *Greenough v. Gaskell*, 1 Mylne & K. 98; *Johnson v. Sullivan*, 23 Mo. 474; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Clark v. Richards*, 3 E. D. Smith, 89; extended note to *Bacon v. Frisbie*, 36 Am. Rep. 633.

Thus, it is said in *Denver Tramway Co. v. Owens*, 20 Colo. 107, 127, that: "In determining whether or not an attorney should be required or permitted to testify to a conversation between himself and another person without the consent of the latter, the test is, Had such person at the time of the conversation employed the attorney in his professional capacity in respect to the subject matter of the conversation? If yes, the testimony would not be admissible; otherwise, it would be. To constitute professional employment, it is not essential that the client should have employed the attorney professionally on any previous occasion. Such a limitation of the rule would bear hard upon a person involved in legal controversy for the first time, and also upon an attorney with his first cause. It is not necessary that any retainer should have been paid, promised, or charged for; nor are such matters of any importance except as they may tend to show whether the attorney was or was not professionally employed; neither is it material that there was a suit pending at the time of the consultation, nor that the attorney consulted did not afterward undertake the case about which the consultation was had. If a person, in respect to his business affairs or troubles of any kind, consults with an attorney in his professional capacity with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established; and the communication made by the client, or advice given by the attorney under such circumstances, is privileged. An attorney is employed—that is, he is engaged in his professional capacity as a lawyer or counselor—when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings, or advocating his client's cause in open court. It is the consultation between attorney and client which is privileged, and which must ever remain so, even though the attorney, after hearing the preliminary statement, should decline to be retained further in the cause, or the client, after hearing the attorney's advice, should decline to further employ him. The general rule undoubtedly is, that a breach of professional relations between attorney and client, whatever may be the cause, does not of itself remove the seal of silence from the lips of the attorney in respect to matters received by him in confidence from his client."

What is here said as to the employment of an attorney in his professional capacity is well supported by authority. It has been held that the relation of attorney and client is not consummated without a retainer or fee paid: *De Wolf v. Strader*, 26 Ill. 225; 79 Am. Dec. 371; but this is not now the law. A formal retainer is not necessary to constitute the relation of attorney and client. Neither is it necessary that any actual fee or compensation should be actually paid. Communications made to an attorney in the course of any personal employment, relating to the subject thereof, and which may be supposed to be drawn out in consequence of the relation in which the parties stand to each other, are under the seal of confidence, and entitled to protection as privileged communications, irrespective of the question as to whether any fee has been charged by, or paid to, the attorney: *Andrews v. Simms*, 33 Ark. 771; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Gage v. Gage*, 13 N. Y. App. Div. 565; *Earle v. Grout*, 46 Vt. 113; *McMannus v. State*, 2 Head, 213; *Beltzhoover v. Blackstock*, 8 Watts, 20; 27 Am. Dec. 330; *Reed v. Smith*, 2 Ind. 160; *Davis v. Morgan*, 19 Mont. 141.

The privilege is not affected by the circumstance that the client offered no compensation and the attorney did not make or expect to make any charge for his opinion: *March v. Ludlum*, 3 Sand. Ch. 35, 49. Communications from clients to attorneys are privileged, and the attorney cannot testify to them if objection is made, even though he received no retainer in the case: *Orisler v. Garland*, 11 Smedes & M. 136; 49 Am. Dec. 49. The term "client" should be understood in its most enlarged sense, and the statutory prohibition against divulging privileged communications should close the mouths of all who have listened to disclosures looking to professional aid. Hence, the rule excluding testimony of professional communications between attorney and client is broad enough to embrace a case where the one seeking counsel pays no fee and employs other attorneys in the prosecution of the business, and even where the attorney consulted is afterward employed on the other side: *Cross v. Riggins*, 50 Mo. 335. So facts obtained by a lawyer during negotiations as to the amount of pay he should receive for his services to prosecute a suit are privileged and inadmissible in evidence, although such negotiations resulted in no employment, because the parties could not agree upon the fee to be paid: *Thorp v. Goewey*, 85 Ill. 611, 615. A communication made to an attorney, solicitor, or counselor before retainer is not privileged, and must, if required, be disclosed in evidence by such attorney, solicitor, or counselor, though he is afterward retained professionally: *Cuts v. Pickering*, Vent. 197. So if one talks with a lawyer about matters which may be the subject of litigation, and there is no retainer, and nothing showing that his advice was sought to regulate the future conduct of the other party as to such matters, the conversation is not privileged from disclosure as a confidential communication between client and counsel: *Earle v. Grout*, 46 Vt. 113; *Coon v. Swan*, 30 Vt. 6; *Thompson v. Kilborne*, 28 Vt. 750; 67 Am. Dec. 742. In this case the prevailing practice of the legal profession of the state of

Vermont, in giving opinions and advice upon legal subjects, without particular study and examination, and without corresponding pay, and a distinct retainer, was condemned as a vicious one.

Communications made by a person in a conversation with an attorney with a view of retaining the latter are privileged, and they cannot be called out from the attorney in evidence, although the relation of attorney and client is never established: *State v. Tally*, 102 Ala. 25, 35; *Hawes v. State*, 88 Ala. 37; *Peek v. Boone*, 90 Ga. 767. A communication to an attorney, under the impression that he had consented to act as attorney of the party, is privileged, even though the attorney himself may not have so understood the agreement: *Alderman v. People*, 4 Mich. 414; 69 Am. Dec. 321; but to prevent an attorney from testifying to a communication made to him, it must have been made to him as an attorney, and for the purpose of obtaining his advice and opinion relative to some legal right or obligation: *Alderman v. People*, 4 Mich. 414; 69 Am. Dec. 321; *McMannus v. State*, 2 Head, 213; *Earle v. Grout*, 46 Vt. 113; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Flack v. Neill*, 26 Tex. 273; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; *Caldwell v. Davis*, 10 Colo. 481; 3 Am. St. Rep. 599; *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834; extended note to *Bacon v. Frisbie*, 36 Am. Rep. 633. In other words, the relation of attorney and client must have existed in order that the communication between them may be privileged, thus preventing the attorney from giving testimony concerning it: *Basye v. State*, 45 Neb. 261; *Matthews v. Hoagland*, 48 N. J. Eq. 455; *Everett v. State*, 30 Tex. App. 682; *Iamb v. Almy*, 19 R. I. 586; *Granger v. Warrington*, 3 Gilm. 299; *Brown v. Matthews*, 79 Ga. 1; *Rockford v. Falver*, 27 Ill. App. 604; *Cotton v. State*, 87 Ala. 75; *Coon v. Swan*, 30 Vt. 6; *Romberg v. Hughes*, 18 Neb. 579; *Bramwell v. Lucas*, 4 Dowl. & R. 367; *Causey v. Wiley*, 27 Ga. 444.

The rule of secrecy obtains so far as the attorney has received information solely from a person coming to him in the character of a client, but no further: *Bogert v. Bogert*, 2 Edw. Ch. 399, 403. A 'witness' testimony as to conversations with a party to an action cannot be excluded on the ground that the witness was an attorney at law and the communication was confidential, unless it appears that he was the attorney for the party, and that the communication was made in the course of professional employment: *Sharon v. Sharon*, 79 Cal. 633, 678. That one is regarded as the general lawyer of another does not close his mouth as a witness. If he is consulted as a friend about a matter as to which the relation of attorney and client does not exist, the communication is not privileged: *Branden v. Gowing*, 7 Rich. 459. "To exclude declarations as communications to counsel, or made with a view to employment, their root in the relation, or contemplated relation, of client and attorney must be manifest. They must be the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it. To tax a lawyer's courtesy or liberality for advice or services is not to employ him." That would show that he was "raided," not retained. "The test of employment"

is sometimes said to be "the fee": *Brown v. Matthews*, 79 Ga. 1, 8. We have seen that a fee or retainer is not necessary to constitute the relation of attorney and client, but the payment of a fee is good evidence of the relation and undoubtedly the most satisfactory way of establishing it. The privilege of an attorney, called as a witness, only extends to communications connected with the business in which he has been retained, and not to extraneous matters: *Riggs v. Denniston*, 3 Johns. Cas. 198; 2 Am. Dec. 145; *Gillard v. Bates*, 6 Mees. & W. 547. The communication, however, need not necessarily relate to litigation: *Carnes v. Platt*, 15 Abb. Pr., N. S., 337. It is privileged if made with reference to the object or subject of the attorney's employment, though not made in the prosecution or defense of any suit, begun or contemplated: *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189. Communications between attorney and client are privileged on the ground of public policy, and it is, therefore, immaterial that the attorney, called as a witness, is willing to disclose them: *People v. Atkinson*, 40 Cal. 284; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627. A privileged communication between attorney and client is not to be revealed, at any period of time, by the testimony of the attorney in any action or proceeding between other persons, even after the relation of attorney and client has ceased. The privilege is that of the client, and never ceases unless voluntarily waived by the client: *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Chase's case*, 1 Bland's Ch. 206; 17 Am. Dec. 277; *Granger v. Warrington*, 3 Gilm. 209, 308; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *Crisler v. Garland*, 11 Smedes & M. 136; 49 Am. Dec. 49; *Mitchell v. Bromberger*, 2 Nev. 345; 90 Am. Dec. 550; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Dickson v. McLarney*, 97 Ala. 383; *Kimball v. Holmes*, 60 N. H. 162; *King v. Barrett*, 11 Ohio St. 261; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Calley v. Richards*, 19 Beav. 401; *Wilson v. Rastall*, 4 Term Rep. 753.

Privileged Communications.—All confidential communications made by a client to his attorney, for the purpose of professional advice or assistance, as to all matters which are the proper subject of professional employment, whether communicated with or without an injunction of secrecy, are privileged and not admissible in evidence: *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Causey v. Wiley*, 27 Ga. 444; *Higbee v. Dresser*, 103 Mass. 523; *King v. Barrett*, 11 Ohio St. 261; *Andrews v. Simms*, 33 Ark. 771; *Minet v. Morgan*, L. R. 8 Ch. App. 361, 368; *Wetherbee v. Ezekiel*, 25 Vt. 47; *Maxham v. Place*, 46 Vt. 434; *Walker v. Wildman*, 6 Madd. 47; *Hughes v. Boone*, 102 N. C. 137; *Williams v. Fitch*, 18 N. Y. 546; *Johnson v. Sullivan*, 23 Mo. 474; *Riggs v. Denniston*, 3 John. Cas. 198; 2 Am. Dec. 145; *Doe v. Harris*, 5 Car. & P. 592; *Fenner v. London etc. Ry. Co.*, L. R. 7 Q. B. 767; *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Beltzhoover v. Blackstock*, 8 Watts, 20; 27 Am. Dec. 330; *Bank of Utica v. Mersereau*, 3 Barb.

Ch. 528; 49 Am. Dec. 189; Root v. Wright, 84 N. Y. 72; 38 Am. Rep. 495; extended note to Bacon v. Frisbie, 36 Am. Rep. 632; Gallagher v. Williamson, 23 Cal. 331; 83 Am. Dec. 114; Riggs v. Denniston, 3 Johns. Cas. 198; 2 Am. Dec. 145; Wade v. Ridley, 87 Me. 368.

A communication to an attorney, in reference to his client's personal estate, made when the attorney is retained to draw an affidavit for the purpose of procuring a reduction of the assessment of such estate, is privileged: Williams v. Fitch, 18 N. Y. 546. The same principle applies to conversations with an attorney who is employed to draw a warrant of attorney, where the tendency of the communication is to show that judgment was confessed for the purpose of defrauding creditors: Bank of Utica v. Mersereau, 3 Barb. Ch. 528; 49 Am. Dec. 189. The common attorney of two or more parties, adverse in interest, cannot testify in a suit between one of them and a third person, to communications made between them in his presence, before suit, while he was acting as such attorney in respect to the matter in question: Root v. Wright, 84 N. Y. 72; 38 Am. Rep. 495. In ejectment, the plaintiff's attorney cannot be made to testify whether the plaintiff had not employed him to sue for his individual benefit, and had authorized his name as administrator to be used for his individual benefit, thus covertly seeking a disclosure of a disclaimer of title for the estate represented: Doe v. Mattox, 37 Ga. 289. A confidential communication does not cease to be privileged by the fact that the attorney or counsel afterward becomes interested as devisee of the property, although the communication related to its title: Chant v. Brown, 7 Hare, 79. After a claimant has deposed that obstacles have arisen in granting a second lease where but one lease has been granted, he is not bound, on cross-examination, to answer whether the obstacles were suggested by him to his solicitor, or by his solicitor to him, although the communication was before any litigation was in contemplation: Turton v. Barber, L. R. 17 Eq. 329. Written communications which pass between attorney and client before any dispute arises between the parties to a suit are privileged, so far as they contain legal advice or opinions, but not otherwise, although they relate to matters which form the subject of the suit, because there is, with respect to the privilege of professional confidence, no essential difference between cases stated for the opinion of counsel, and other communications: Walsingham v. Goodricke, 3 Hare, 122; Minet v. Morgan, L. R. 8 Ch. App. 361. Letters written or cases stated by a party or his solicitor, for the opinion of counsel, with a view to a suit contemplated, are privileged from production, not only in that suit but in any subsequent litigation with third persons respecting the same subject matter, and which involves the question to which such letters and cases relate: Holmes v. Baddeley, 1 Phill. Ch. 476. The sale of estates is one of the matters within the scope of the ordinary duties of a solicitor. Hence, a solicitor is not at liberty to disclose what passes in conversations between himself and the client, or the latter's agent, with respect to the amount of bidding to be reserved upon the sale of an estate in which

he has been concerned for such client or agent, or to other matters connected with such sale: *Corpmael v. Powis*, 1 Phill. Ch. 687.

The rule that a witness will be protected from answering as to any confidential communication between himself and his attorney applies, not only to judicial proceedings which have been contemplated or commenced, but to those which may by possibility become the subject of judicial inquiry: *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 408. Such communications are protected when made with a view to professional employment, and in reference to such employment in legal proceedings pending or contemplated, or in any other legitimate professional services wherein professional advice or aid is sought: *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599. It is enough if the matter in hand may become the subject of judicial inquiry, and the employment of counsel is so connected with his professional character as to afford the presumption that this formed the ground of the confidence reposed: *Moore v. Bray*, 10 Pa. St. 519, 524; *Greenough v. Gaskell*, 1 Mylne & K. 98, 101; *In re Aitkin*, 4 Barn. & Ald. 47; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Britton v. Lorenz*, 45 N. Y. 51. Confidential communications between an attorney and client are privileged and protected from inquiry when the client is a witness as well as when the attorney is a witness: *Bigler v. Reyher*, 43 Ind. 112; *Carnes v. Platt*, 15 Abb. Pr., N. S., 337. A client cannot be compelled to disclose communications which his attorney will not be permitted to disclose: *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517. Any information derived from the client, by virtue of the attorney's employment, whether by words, deeds, or acts, is privileged: *State v. Dawson*, 90 Mo. 149; but the rule as to privileged communications between attorney and client is to be strictly construed, as it tends to exclude evidence of the facts, while the general rules of evidence require evidence of the facts to be divulged: *Granger v. Warrington*, 3 Gilm. 299, 308.

Admissions to an attorney to elicit advice are privileged: *Wade v. Ridley*, 87 Me. 368; *Maas v. Bloch*, 7 Ind. 202; *Borum v. Fouts*, 15 Ind. 50; *Bowers v. Briggs*, 20 Ind. 139. Thus, if, by the admissions of a party, a champertous contract is established between him and his attorney, such attorney is not a competent witness to prove the falsity of his client's statements, and that no such contract was entered into: *Dowell v. Dowell*, 3 Head, 501. In an action for negligence, the plaintiff cannot be compelled to state whether, in consultation with his attorney, he did not make a different statement to him as to the cause of the accident from that made by him upon the witness stand: *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517. An attorney at law is incompetent to testify as to his knowledge of an insurance policy, the identity of the beneficiaries named therein, the collection of the money and its payment to the client, where such information has been acquired while acting in his professional capacity under employment to collect the policy, and by reason of the relationship of attorney and client: *Freeman v. Brewster*, 93 Ga. 648. So statements made by an applicant for a pension, to one acting as his attorney in the matter, cannot be proved in an

action upon a policy of life insurance subsequently applied for and obtained by the pensioner, for such statements are privileged communications: *Mutual Life Ins. Co. v. Selby*, 72 Fed. Rep. 980. And, upon a bill of discovery, in aid of an action at law, brought by a shipper against a railroad company, to recover damages for loss of goods, the company will not be required to produce, for the plaintiff's benefit, a report made by the local freight agent of the defendant to its general freight agent, relating to the goods in controversy, and intended to be sent by the general agent to counsel for use on the trial of the case: *Davenport Co. v. Pennsylvania R. R.*, 166 Pa. St. 480.

Communications not Privileged.—The question as to what may be a privileged communication does not depend upon its importance or materiality in the prosecution or defense of a suit, but on the character of the communication: *Aiken v. Kilburne*, 27 Me. 252. The question whether a communication between client and attorney is admissible in evidence is not, in actions in the federal courts, dependent upon the statutes of the state in which the court sits: *Liggett v. Glenn*, 51 Fed. Rep. 381. An attorney may testify that a person was a contestant: *Selp's Estate*, 163 Pa. St. 423; 43 Am. St. Rep. 808; and he may testify as to the terms of a settlement: *Schubkagel v. Dierstein*, 131 Pa. St. 47. A communication to an attorney by one not interested in a suit is not privileged: *Allen v. Harrison*, 30 Vt. 219; 73 Am. Dec. 302; and a communication by an assignor to the attorney of the assignee is not privileged if the attorney was acting for his client: *Hall v. Rixey*, 84 Va. 790. So if a client sues an attorney for money converted to his own use, and the attorney pleads that he paid it to others at the direction of the plaintiff, the defendant must testify as to whom the payments were made, though they be considered a communication, and the attorney acted not only for the plaintiff, but for the parties to whom the payments were made: *Minard v. Stillman*, 31 Or. 164; 65 Am. St. Rep. 815. An attorney may testify for his client: *Baldwin v. National Hedge etc. Co.*, 73 Fed. Rep. 574; and he is a competent witness against his client as to all matters not privileged: *State v. Hedgepeth*, 125 Mo. 14.

An attorney called as a witness is bound to testify as to any matters which comes to his knowledge in any other way than through confidential communications from his client. His privilege does not extend to information derived from other sources than through his client, even while he is acting as an attorney. He must not disclose anything confided to him by his client, but he is bound to testify as to any matter which, in any other way, has come to his knowledge: *Rhoades v. Selin*, 4 Wash. C. C. 715, 718; *Milan v. State*, 24 Ark. 346; *Walker v. Wildman*, 6 Madd. 47; *Stoney v. McNeill*, Harp. 557; 18 Am. Dec. 666; *Crosby v. Berger*, 11 Paige, 377; 42 Am. Dec. 117; *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543; *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114; *Swain v. Humphreys*, 42 Ill. App. 370; extended note to *Bacon v. Frisbie*, 36 Am. Rep. 632, 633 n; *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415. He may testify as to collateral facts or things not known through confiden-

tial communications; as that his client expressed himself satisfied with a new security: *Helster v. Davis*, 3 Yeates, 4; *Walsingham v. Goodricke*, 3 Hare, 122. He may testify to the handwriting of his client, though he became acquainted with it after the suit commenced, but not by communication with the client: *Johnson v. Daverne*, 19 Johns. 134; 10 Am. Dec. 198. As a lawyer is not prohibited by the rule of privilege from testifying to his client's handwriting, he may testify as to the genuineness of signatures appended to a certain contract, purporting to have been signed by the client: *Holthausen v. Pondir*, 23 Jones & S. 73; *Glenn v. Liggett*, 47 Fed. Rep. 472; *Liggett v. Glenn*, 51 Fed. Rep. 381.

There is no privilege in cases where abstract legal opinions are sought and obtained on general questions of law, either civil or criminal. In such cases, no facts are or need be disclosed implicating the client, and so there is nothing of a confidential character to conceal: *McManus v. State*, 2 Head. 213; and the fact that a witness has been an attorney for a party does not render him incompetent to testify as to statements or declarations of the latter, which are not confidential communications made in the course of professional business: *Harless v. Harless*, 144 Ind. 196. So a communication to an attorney who had previously been counsel for the party is not privileged: *Turner's Estate*, 167 Pa. St. 609. An attorney may testify as to statements made casually to him by a former client after the relation has ceased: *Wadd v. Hazleton*, 62 Hun, 602. Explanatory statements made by a client some time after a professional consultation with his attorney are not privileged: *McDonald v. McDonald*, 142 Ind. 55, 74; especially where the attorney declares that he was not consulted professionally, and that he listened to such statements and advised only as a friend: *McDonald v. McDonald*, 142 Ind. 55, 74. An attorney consulted merely as a friend may testify: *Ewers v. White*, Mich., Sept., 1897; *People v. Buchanan*, 145 N. Y. 1; *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834; *Patten v. Glover*, 1 App. D. C. 466, especially where both parties hear the communications: *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834.

If a former client voluntarily repeats to his attorney, after the relation of attorney and client has ceased, communications previously made, the attorney, if he has used no artifice in the matter, is a competent witness as to such subsequent communications: *Jordan v. Hess*, 13 Johns. 492; and the same rule applies, of course, to communications made under such circumstances, though they are not repetitions of the first: *Brady v. State*, 39 Neb. 529. Communications between a party litigant or his counsel and a mere witness are not privileged, and this principle applies to an expert witness employed by a party to patent litigation, or his counsel; but the rule of privilege protects such an expert in the act in question, in so far as he has been employed as assistant to counsel, and not as a witness: *Lalancé etc. Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. Rep. 563. Communications voluntarily made to a lawyer after he has informed the person making them that he will not and cannot accept the employment to which the communications relate are not

privileged: *Farley v. Peebles*, 50 Neb. 723; *Theisen v. Dayton*, 82 Iowa, 74.

An attorney may testify that a certain person is his client, as this is not a privileged communication: *Chirac v. Reinicker*, 11 Wheat. 280; *Arkansas City Bank v. McDowell*, Kan., Feb., 1898. He may be examined as to the mere fact of the existence of the relationship of attorney and client: *Chirac v. Reinicker*, 11 Wheat. 280; and may be asked whether he has been retained by a party as counsel or attorney, and what the name of his client is in any particular suit: *Satterlee v. Bliss*, 36 Cal. 489; *Gower v. Emery*, 18 Me. 79; *Brown v. Payson*, 6 N. H. 443; *Hampton v. Boylan*, 46 Hun. 151; *White v. State*, 86 Ala. 69. He cannot refuse to answer such a question, for it calls for no breach of professional confidence: *Mobile etc. Ry. Co. v. Yeates*, 67 Ala. 164; *Leindecker v. Waldron*, 52 Ill. 283; *White v. State*, 86 Ala. 69. An attorney may be asked who employs him, in order to show the real party, and so let in his declarations: *Levy v. Pope*, *Moody & M.* 410. He may be required to produce his authority for prosecuting a suit: *McKiernan v. Patrick*, 4 How. (Miss.) 333. If a lawyer is employed to foreclose a mortgage, and the plaintiff denies his authority to prosecute a collateral action during the litigation and before a decree, which would, if prosecuted, estop the plaintiff, and the question of the attorney's authority becomes important, in a subsequent action, to determine the rights of parties affected by the first decree, the attorney may, without violating the law of privileged communications, testify as to his employment, as to the instructions given him by his client, and as to the latter's approval of the course pursued by the former, particularly where the confidential relation between them has ceased and the attorney's authority is called in question by the client, and in a case where the equities of third parties are to be settled without detriment to the rights of the client: *Brigham v. McDowell*, 19 Neb. 407. An attorney who has appeared for a party without authority is a competent witness to prove that fact: *Cox v. Hill*, 3 Ohio, 411; and he may testify as to actions taken, statements made by himself as attorney, and his authority for acting: *Fort Dodge v. Minneapolis etc. Ry. Co.*, 87 Iowa, 389. He may be asked as to what occurred in open court, and may answer as to what title was in question in a certain case: *Chirac v. Reinicker*, 11 Wheat. 280.

The court may compel an attorney who brings suits on behalf of a number of persons as plaintiffs, against one defendant, to exhibit his authority for bringing the suits and to disclose the names and residences of his clients: *Ninety-nine Plaintiffs v. Vanderbilt*, 1 Abb. Pr. 193. In a joint action for a libel by three plaintiffs, the defendants may call on the attorney of one of them for an account of the residence or occupation of the others: *Worton v. Smith*, 6 J. B. Moore, 110. A solicitor must give to the court any information which may lead to the discovery of the residence of a ward of the court, whose residence is being concealed from the court, although such information may have been communicated to him by his client in the course of his professional employment. Hence, if the mother of wards of court has absconded with them, her solicitor will be

ordered to produce the envelopes of letters received from her as her solicitor, so that her residence may be discovered from the post-marks on such envelopes: *Ramsbotham v. Senior*, L. R. 8 Eq. 575. An attorney may be compelled to answer whether the party he represents be fictitious: *Martin v. Anderson*, 21 Ga. 301. An attorney may testify as to negotiations for a compromise and settlement: *Koons v. Beach*, 147 Ind. 137; *Chickering v. Brooks*, 61 Vt. 554; *Griffith v. Davies*, 5 Barn. & Adol. 502; *Gainsford v. Grammar*, 2 Camp. 9; *Turner v. Railton*, 2 Esp. 474; *Collier v. Nokes*, 2 Car. & K. 1012. If two persons in dispute have one common attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other: *Baugh v. Cradocke*, 1 Moody & R. 182; *Cleve v. Powel*, 1 Moody & R. 228; *Perry v. Smith*, 9 Mees. & W. 681.

If a party appears by attorney in a justice's court the attorney is a competent witness to prove the authority to himself to appear as attorney in the suit: *Caniff v. Myers*, 15 Johns. 246. So he may testify that he brought suit for a certain firm, recovered judgment, collected the money, and paid it over to a person to whom he was directed to pay it by the letter and assignment of one of the firm. Such facts are not privileged communications from his clients: *Fulton v. Maccracken*, 18 Md. 528; 81 Am. Dec. 620. Neither is a statement made to a lawyer by one for whom he had drawn certain releases, and after their execution, that they belonged to the grantee in them, and that such grantee wished the lawyer to keep them in his safe: *Toms v. Beebe*, 90 Iowa, 612. So if an attorney called as a witness for the defendant, in proceedings supplementary to execution, testifies that he had in his possession, or under his control, after the commencement of the action, money, notes, checks, evidence of indebtedness, or other property of the defendant, it is competent for the plaintiff to ask him what he did have and what disposition he made of the same, as the facts necessary to make proper answers to these questions are not privileged: *State v. Gleason*, 19 Or. 159, 162, and authorities there cited. And upon an issue as to whether a deed is a mortgage, an attorney, who has been employed by an administrator in the settlement of the estate, may testify that he searched the decedent's papers, and state what he found bearing on the issue, and say that he sent a note found to another attorney for collection, that it was paid, and that a quit-claim deed was delivered therefor: *Caldwell v. Meltveldt*, 93 Iowa, 729. The evidence of an attorney, on an issue as to whether the purchase of certain merchandise was made in good faith, that he, a few days before the sale, informed the purchaser of claims held by the witness against the seller, is not privileged as a communication from attorney to client, even where the purchaser had sought advice from the attorney, thus causing him to suspect that the former intended to buy the goods: *Rosewater v. Schwab Clothing Co.*, 58 Ark. 446. Some privileged communications may lose their privileged character by the lapse of time. That which may be private at one time may not be private at an after time. Thus, directions to an attorney to make a certain contract are a confidential

communication before, but not after the contract is made. A solicitor cannot be compelled to disclose the contents of an answer in equity before it is filed, but may be afterward. These principles were applied in *Snow v. Gould*, 74 Me. 540; 43 Am. Rep. 604, to a case of executed instructions, where no fact in the case was "exposed," and no secret "let loose." There a client wrote to his attorney to bring a suit for divorce at once, so that his wife might have time to think of the matter, and perhaps consent to a quiet separation without public scandal. He also orally instructed him to withdraw the suit if a jury trial could not be avoided. It was held, in an action by the attorney for services in that suit, that evidence of those instructions was proper: *Snow v. Gould*, 74 Me. 540; 43 Am. Rep. 604.

An attorney is a competent witness and must testify as to statements made by his client to others, or by others to the client, or to each other, in his hearing and presence, either before or after his employment as attorney. He must testify as to all acts and transactions of his client with third persons and in his presence, as such communications are not privileged: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114; *Carey v. Carey*, 108 N. C. 267; *People v. Buchanan*, 145 N. Y. 1; *Hughes v. Boone*, 102 N. C. 137, 159; *Patten v. Moor*, 29 N. H. 163; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; extended note to *Bacon v. Frisbie*, 36 Am. Rep. 632; *Mobile etc. Ry. Co. v. Yeates*, 67 Ala. 164; *Frank v. Morley*, 106 Mich. 635; *State v. Swafford*, 98 Iowa, 362; *In re Bauer*, 79 Cal. 304; *Murphy v. Waterhouse*, 113 Cal. 467; 54 Am. St. Rep. 365; *Sandiford v. Frost*, 9 N. Y. App. 55; *Mobile etc. Ry. Co. v. Yeates*, 67 Ala. 164; *Harris v. Daugherty*, 74 Tex. 1; 15 Am. St. Rep. 812; *Chapman v. Peebles*, 84 Ala. 283; *Carr v. Weld*, 19 N. J. Eq. 319; *Roper v. State*, 58 N. J. L. 420; but it is held in Massachusetts that an attorney cannot testify as to a consultation with his client, though had in the presence of a third party, as that fact does not qualify him as a witness: *Blount v. Kimpton*, 155 Mass. 378; 31 Am. St. Rep. 554; and, of course, third persons who were present at a conference between the attorney and client are competent witnesses and may testify as to communications between the attorney and client: *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Goddard v. Gardner*, 28 Conn. 172. So a third party, who has overheard a communication between an attorney and his client, whether by accident or design, and who stands in no relation of confidence to either, may be compelled to testify to it: *Perry v. State*, Idaho, Dec. 1894; *Hoy v. Morris*, 13 Gray, 519; 74 Am. Dec. 650; *Goddard v. Gardner*, 28 Conn. 172; *Cotton v. State*, 87 Ala. 75; *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Basye v. State*, 45 Neb. 261. An attorney, being asked whether he was present when an account stated was signed, and when and where it was signed, and who were present, cannot properly refuse to answer on the ground that the matter is in the nature of a privileged communication: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287. So an attorney, called by his client to witness a business transaction between the latter and

a third person, is not privileged from testifying to what he there saw: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287. The privilege of counsel does not extend to information acquired from persons other than his client, though obtained while acting as counsel: *Crosby v. Berger*, 11 Paige, 377; 42 Am. Dec. 117. Communications made to an attorney by a third person in the presence of the client are not privileged: *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415. Neither are communications made to an attorney in the presence of a friend: *People v. Buchanan*, 145 N. Y. 1.

A communication between client and attorney is not confidential when made in the presence of the other party, and is, therefore, not privileged. Where it is made in the presence of all the parties to the controversy, evidence of the communication is competent between such parties, and the attorney may be required, in an action between them, to testify thereto. If a lawyer acts as the common attorney of two parties, their communications to him are privileged so far as strangers are concerned, but, as to themselves, they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations: *Deuser v. Walkup*, 43 Mo. App. 625; *Haley v. Eureka Co. Bank*, 21 Nev. 127; *Colt v. McConnell*, 116 Ind. 249; *In re Bauer*, 79 Cal. 304; *Lynn v. Lyerle*, 113 Ill. 128; *Whiting v. Barney*, 30 N. Y. 330; 86 Am. Dec. 385; reversing the same case 38 Barb. 393; *Britton v. Lorenz*, 45 N. Y. 51, 57; *Carey v. Carey*, 108 N. C. 267; *Hughes v. Boone*, 102 N. C. 137; *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834; *Michael v. Foll*, 100 N. C. 178; 6 Am. St. Rep. 577; *Seips' Estate*, 163 Pa. St. 423; 43 Am. St. Rep. 803; *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Smith v. Crego*, 54 Hun, 22; *Sparks v. Sparks*, 51 Kan. 195; *Sandiford v. Frost*, 9 N. Y. App. Div. 55; *Livingston v. Wagner*, 23 Nev. 53; *Hanlon v. Doherty*, 109 Ind. 37; *Gulick v. Gulick*, 39 N. J. Eq. 516; *Perry v. Smith*, 9 Mees. & W. 681; *Regina v. Farley*, 2 Car. & K. 313, 318. Contra, *Hull v. Lyon*, 27 Mo. 570; *Sandiford v. Frost*, 9 N. Y. App. Div. 55; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; *Minard v. Stillman*, 31 Or. 164; 65 Am. St. Rep. 815; *Murphy v. Waterhouse*, 113 Cal. 467; 54 Am. St. Rep. 365; *Piper v. Fosher*, 121 Ind. 407; *Harris v. Daugherty*, 74 Tex. 1; 15 Am. St. Rep. 812. If an attorney is acting as agent for both parties to a negotiation, or if they are negotiating with each other in the presence of the attorney of one of them, the communications made in the presence of all of the parties are not privileged as between themselves, and the attorney may be compelled to testify thereto in a suit between them growing out of such negotiations: *Murphy v. Waterhouse*, 113 Cal. 467; 54 Am. St. Rep. 365. An attorney employed by the husband of one of three sisters equally interested in the subject matter of litigation is competent to testify in a subsequent contest between the sisters, involving the same matter, as to who were the parties he represented, and as to the declarations of the husband made during his lifetime, showing for whom he acted in employing the attorney and managing the litigation: *Seip's Estate*, 163 Pa. St. 423; 43 Am. St. Rep. 803. If two or more persons consult an attorney at law for their mutual bene-

fit, and make statements in his presence, he may disclose such statements in any controversy between them or their personal representatives or successors in interest, but not in controversies between them or either of them and third persons: *Hurlburt v. Hurlburt*, 128 N. Y. 420; 26 Am. St. Rep. 482. If an attorney acts for several clients, he cannot testify without the consent of all, and this is true as between his clients, or any of them, and third parties; but where the controversy is between the parties themselves, the rule does not obtain: *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577. If a witness is the attorney for both parties in a transaction, communications made by him in the course of such business are privileged, except in a suit between the parties; but when the evidence is conflicting as to whether he is such attorney, his evidence may be properly admitted: *Harris v. Daugherty*, 74 Tex. 1; 15 Am. St. Rep. 812. If an attorney is acting for two clients his communications with them are not privileged in a subsequent litigation arising between the representatives of the clients: *Sherman v. Scott*, 27 Hun, 331. If an act is done in pursuance of a bargain between two parties, and in the presence of the attorneys for each of them, the communication by one party to his attorney relating to that act, is not privileged, so as to prevent the attorney from giving evidence of it: *Weeks v. Argent*, 16 Mees. & W. 817.

If two contracting parties employ an attorney to draw up their contract, and make their communications to him in the presence of each other, each thereby waives, as against the other, his right to treat those communications as confidential, and each is entitled, in asserting his rights under the contract, to a disclosure of its stipulations from the attorney. Or, if the attorney acts for both parties to an action, and while preparing papers at the instance of both, communications are made to him by either party in the presence of the other, such communications are not privileged, and the testimony of the attorney is competent in regard thereto: *Parish v. Gates*, 29 Ala. 254, 261; *Goodwin etc. Co.'s Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696; *Dikeman v. Arnold*, 78 Mich. 455; *Hanlon v. Doherty*, 109 Ind. 37; *Thomas v. Griffin*, 1 Ind. App. 457; *Childs v. Merrill*, 66 Vt. 302.

A conversation between two persons in the presence of an attorney employed by them to prepare a paper in connection with the subject of the conversation is not privileged, and the testimony of the attorney concerning the conversation is competent: *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570. Communications to be imparted to another are not privileged, particularly if to the adverse party: *White v. State*, 86 Ala. 69; *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578; neither is a communication by one party to the attorney of another: *Carey v. Carey*, 108 N. C. 267; *Henderson v. Terry*, 62 Tex. 281; especially if it is to be communicated to others: *Ferguson v. McBean*, 91 Cal. 63; or a communication made by one party to a mutual attorney to be forwarded to another: *Hughes v. Boone*, 102 N. C. 137.

Deeds.—The principles above announced apply to the preparation of deeds by an attorney. Thus, an attorney employed merely as a

scrivener to draw up a deed for a person is competent to testify concerning what comes to his knowledge in connection with the transaction: *De Wolf v. Strader*, 26 Ill. 225; 79 Am. Dec. 871; as where an attorney is requested by a debtor to draw up a mortgage deed of his personal property, and the debtor discloses his purposes in making such a conveyance, either without any particular motive, or in order to remove any scruple the attorney may have as to the character of the transaction, but no legal advice is asked or given, the testimony of the attorney, as to such communications, is admissible: *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415. But an attorney employed as such to draw a deed must be considered as acting in the line of his profession, particularly if legal advice is asked and given, and he is bound to conceal the facts disclosed by the person who employs him: *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513. In such a case, he should not be allowed to disclose any communication then made to him by his client concerning the object and subject matter of the deed: *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189. He cannot be asked whether a person named applied to him to draw a certain deed: *Doe v. Harris*, 5 Car. & P. 592; and communications made by the purchaser of real estate to an attorney whom he has employed to see that he gets a good title, and to prepare a deed, cannot be testified to by the attorney: *Carter v. West*, 93 Ky. 211.

An attorney who is employed by two persons as a mere scrivener to draw a deed from one to the other, is, as between such persons, competent to testify as to the directions received by him from the parties, and as to the transaction between them at the time, as knowledge acquired under such circumstances is not a privileged communication: *Childs v. Merrill*, 66 Vt. 302; *Hebbard v. Haughian*, 70 N. Y. 54; *Dikeman v. Arnold*, 78 Mich. 455; *Smith v. Long*, 106 Ill. 485. Thus, where it is charged that a clause was fraudulently inserted in a deed without the knowledge of the grantees, the testimony of the attorney who drew the deed as to the instructions given him when the instrument was prepared is competent: *Van Alstyne v. Smith*, 82 Hun, 382. So the testimony of an attorney that he drew a deed for a person, since deceased, and took his acknowledgment, and that the description in the deed embraced a certain parcel of land, may be received where it appears that the deed was drawn, executed, and acknowledged in the presence of the grantee: *Greer v. Greer*, 58 Hun, 251. And, on a bill in equity to set aside a deed made by a father in his lifetime to his daughter, the declarations of the deceased to his attorney while the latter was writing the deed are not privileged, if they were made in the presence of both parties to the transaction: *Hummel v. Kistner*, 182 Pa. St. 216. If a husband makes a deed of gift to his wife, his attorney may testify, on behalf of the wife, as to the husband's instructions with respect to a delivery of the deed to a third person, where such instructions were given mostly in the presence of the wife: *Ruiz v. Dow*, 113 Cal. 490. An attorney who draws a deed may testify that it was given to be delivered to the grantee: *Rosseau v.*

Bleau, 131 N. Y. 177; 27 Am. St. Rep. 578; and he may testify as to the condition of mind of one who instructed him to prepare certain deeds: Wicks v. Dean, Ky., Jan. 1898.

But an attorney employed by the parties to a deed to draw it up cannot, in a controversy between one of them and a third person, be compelled, over the objection of such party, to testify as to communications between himself and his clients, at the time the deed was made, tending to show that it was intended as a mortgage: Gruber v. Baker, 20 Nev. 453. So an attorney employed by consent of two parties in preparing a deed from one to the other cannot be examined as to what he so became informed of in the preparation of the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed: Robson v. Kemp, 4 Esp. 233.

Mortgages.—As in the case of deeds a lawyer who is employed as a mere scrivener to prepare a mortgage is a competent witness as to declarations made to him at the time: Machette v. Wanless, 2 Colo. 169. "It is clear," said Vice-Chancellor Stuart, in Ross v. Gibbs, L. R. 8 Eq. 522, 524, "that where a professional man prepares a mortgage deed on behalf of the mortgagor and mortgagee, and, before a suit by the mortgagor to set aside the mortgage, is present at interviews between the mortgagor and mortgagee, during a period of a year and a half, as to the construction of the deed, and the rights of both parties under it, and during those interviews is not present in the character of professional adviser exclusively of either of the parties, and the litigation is commenced after the last of the interviews at which he was present, none of the communications between him and the mortgagee antecedent to the last interview are privileged from production to the mortgagor in the suit to set aside the deed." A conversation between a mortgagor and a mortgagee in the presence of the attorney employed to draft the mortgage is not a privileged communication, where the statements then overheard were not made for the purpose of obtaining professional advice, and have not served as the basis of any counsel given by the attorney: Hanson v. Bean, 51 Minn. 546; 38 Am. St. Rep. 516. Communications with the mortgagor's lawyer only, or with the lawyer of persons having interests in the mortgaged estate in default of appointment, such lawyer not being the attorney of the mortgagee, are not privileged, when tendered as evidence in a suit to impeach the mortgage security as having been founded on an appointment made in fraud of the power: Ochant v. Brown, 9 Hare, 790.

An attorney, employed to draw an assignment of a mortgage, does not act merely as a notary, but as an attorney, and cannot testify against his client as to disclosures made to him by the latter in the course of such employment: Getzlaff v. Seliger, 43 Wis. 297; and a lawyer is not bound, as a witness, where he had been employed to foreclose a mortgage, to answer whether he had received any instructions from the complainants, his clients, as to the sale thereunder and the amount to be bid: Stuyvesant v. Peckham, 3

Edw. Ch. 579. Communications of the object for which an assignment of a mortgage was made, to a lawyer concerned for the assignee on the distribution of the proceeds of the mortgaged premises, are privileged, although no question there arose as to the object of the assignment, and the attorney considered the communications in the light of a casual conversation: *Moore v. Bray*, 10 Pa. St. 519.

Wills.—It has been said that the reason of the rule respecting privileged communications between attorney and client does not apply to testamentary dispositions of property. "The very foundation on which the rule proceeds seems to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator, there does not seem to be any ground for applying it: *Russell v. Jackson*, 9 Hare, 387, 392. After a testator's death, and when his will is presented for probate, there seems to be no good reason why his attorney who had drawn it should not be allowed, as a matter of public policy, to testify as to the directions given him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator; although, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself: *Doherty v. O'Callaghan*, 157 Mass. 90; 34 Am. St. Rep. 258; *Glover v. Patten*, 165 U. S. 394, 408; *Olmstead v. Webb*, 5 App. D. C. 38, 51; *Turner's Estate*, 167 Pa. St. 609; *Matter of Austin*, 42 Hun, 516; *Layman's Will*, 40 Minn. 371; *Graham v. O'Fallon*, 4 Mo. 338; *Matter of Austin*, 42 Hun, 516; *Scott v. Harris*, 113 Ill. 447, 454. Compare *Blackburn v. Crawfords*, 3 Wall. 175, 192; *Worthington v. Klemm*, 144 Mass. 167; and *Davis v. Davis*, 123 Mass. 590, 597, explained in *Doherty v. O'Callaghan*, 157 Mass. 90; 34 Am. St. Rep. 258. Thus, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged: *Glover v. Patten*, 165 U. S. 394, 408. And in *Matter of McCarthy*, 55 Hun, 7, 12, the court said: "It may often happen that a party in conversation with his counsel, for the purpose of making and preparing a will, may communicate many things of a confidential character which the counsel would not be permitted to disclose, but we entertain the opinion that all the instructions received by the counsel, and all acts of the testator connected with the making and execution of the will which tend to uphold and support the instrument which the testator executed as being his free, voluntary and valid act, may be proved by the person who assisted him in preparing the will, although at that time he was acting as the legal adviser of the testator." On a bill by the next of kin of a deceased party against the latter's executors, who were his residuary devisees and legatees, alleging that the gift of the property was made to them upon a secret trust for the foundation of a school, the testator's solicitor, who was also, after the death of the testator, the solicitor of the defendants, the executors, was examined as a witness for the

plaintiff, and, on the defendants' motion to suppress the depositions of the solicitor on the ground of professional confidence, it was held that the communications between the testator and the solicitor might be read, but that the communications between the defendants, the executors, and the solicitor, after the death of the testator, were privileged: *Russell v. Jackson*, 9 Hare, 387. An attorney is competent, as a witness, to prove that he drew up a will, that he was present at the time of its execution, that he saw the instrument, after the testator's death, in the possession of the testator's family, and that he read it and recollects its principal provisions: *Graham v. O'Fallon*, 4 Mo. 388. The testimony of an attorney, who drew a will and codicils, is admissible when he is called upon as a witness to show what transpired between him and the testator, respecting the execution of the instruments: *Matter of Austin*, 42 Hun, 516. An attorney at law, who had been the legal adviser of a testator, was permitted to disclose communications made to him by the deceased in his lifetime, upon business matters and the advice and counsel given thereon. The object of the testimony was to lay a foundation for the admission in evidence of the attorney's opinion as to the testator's sanity. There was nothing in the testimony reflecting in any manner upon the character or reputation of the deceased, and it was held that the contestant, who was one of the heirs at law of the deceased, could not exclude the testimony by invoking the rule of privileged communications: *Layman's Will*, 40 Minn. 371. In this case the court said respecting the communications mentioned: "These communications between the decedent and his attorney were privileged at common law as well as by statute, the object of the rule being the protection of the client and his estate. And while many text-writers assert emphatically that the seal of secrecy remains forever, unless removed by the party himself, there is abundance of authority for saying that, upon the decease of the only person who could, in his lifetime, exercise the privilege of waiver, the rule should not be so perverted by a strict adherence to it as to render it inconsistent with its object, and thus bring it into direct conflict with the reason upon which it is founded: *Russell v. Jackson*, 9 Hare, 387; *Blackburn v. Crawfords*, 3 Wall. 175, 192; *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358. The object of the rule, so far as it relates to this class of communications, being the protection of the estate, there remains no reason for continuing it when the very foundation upon which it proceeds is wanting. The testimony called for was quite necessary in order to determine the weight which ought to be given the witness' opinion as to the mental condition of the testator, and his disclosures in no way reflected upon the character or reputation of the deceased. The testimony when given served to protect the estate, and tended to aid in a proper disposition of it. The issue in the case was as to the mental soundness of a person under whom each litigant claimed, and, whatever the result, the interest and the estate of the deceased were not prejudicially affected. It is not an action in which the success of an adverse third party must prove detrimental to the

property. Neither of these litigants can be permitted to invoke the rule respecting privileged communications for the purpose of excluding material and important evidence of the character above described upon the only question involved in the dispute, namely, the sanity of the deceased. The testimony of the witness was properly received": *Layman's Will*, 40 Minn. 371, 372. If a lawyer accepts a retainer to contest the probate of a will which he drew, and about which he advised the testator, he must testify as a witness, if called by the proponents: *Sheridan v. Houghton*, 6 Abb. N. C. 234. Although statements made by one to his legal adviser are privileged if offered in evidence against the client while living, yet they are not privileged after his death, in an inquiry to ascertain, as between his devisees under his will and a grantee claiming under his deed made after the will, as to what he intended by his deed: *Scott v. Harris*, 113 Ill. 447.

But some cases hold that a lawyer in receiving the directions or instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given to him, still acts in a professional capacity and is prohibited from testifying as to any communication made to him by his client during the course of such business: *Loder v. Whelpley*, 111 N. Y. 239; *Gurley v. Park*, 135 Ind. 440; *Matter of Bedlow*, 67 Hun, 408; and that a communication had with reference to the validity of a will, passed between the plaintiff and his legal adviser between the date of the will and the death of the testator, is privileged: *Calley v. Richards*, 19 Beav. 401; and yet there are other authorities which support the proposition that if a testator calls in his attorney to witness his will, it is a waiver which enables the attorney to testify as to the circumstances attending its execution, including the mental condition of the testator at that time, as evidenced by his actions, conduct and conversation: *Denning v. Butcher*, 91 Iowa, 425; *Matter of Coleman*, 111 N. Y. 220; *In re Wax*, 106 Cal. 343; *In re Mullin*, 110 Cal. 252; *Taylor v. Pegram*, 151 Ill. 106, 113. An attorney who drafts a will, and signs it as a witness at the request of the testator, may testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation: *McMaster v. Scriven*, 85 Wis. 162; 39 Am. St. Rep. 828. The testator, by requesting his attorney to sign a will as attesting witness, consents, in effect, that whenever the will is offered for probate, he may be called as a witness and testify to any facts within his knowledge, necessary to establish its validity, and waives the requirement of secrecy: *In re Wax*, 106 Cal. 343.

Attesting Witness—Notary—Acknowledgment.—An attorney is a competent witness to prove the execution of an instrument signed by him as a witness. See "Wills," supra, and the principal case. An attorney who drafts a mortgage and signs it as a witness is entitled to testify to what occurred at the time of its execution: *Monaghan Bay Co. v. Dickson*, 39 S. C. 146; 39 Am. St. Rep. 704; and if he is made a witness to the execution of a deed, the signing of an

answer, or any other fact, may be required to testify concerning the same: *Brazel v. Fair*, 26 S. C. 370; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287. An attorney, who witnessed a deed which he was employed to prepare, may be compelled to testify with respect to execution; also, as to whether it was antedated, or has been altered, or as to the date of its actual delivery; and, in the event of its being lost or suppressed, he may be required to give evidence of its contents. But he will not, because of his being a subscribing witness, be allowed to disclose communications made to him by his clients respecting the subject or object of the conveyance: *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189.

An attorney may be required to testify as to the execution of an instrument, if within his knowledge: *Robson v. Kemp*, 4 Esp. 233, 236; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287. See "Wills," *supra*. If an attorney at law prepares and writes an order for the defendant to sign, which the defendant subsequently swears that he did not sign, such attorney is a competent witness to prove its execution by the defendant, and the rule of privileged communications as between attorney and client does not apply in such a case: *Rahm v. State*, 30 Tex. App. 310; 28 Am. St. Rep. 911. So, if a lawyer draws up a mortgage securing several debts, he may testify as to what was then said by the parties as to applying the proceeds of the mortgage to one of the debts first: *Wyland v. Griffith*, 96 Iowa, 24. If a legal document is executed or altered in the presence of an attorney he may be required to testify as to the fact: *Patten v. Moor*, 29 N. H. 163. In *Brown v. Grove*, 80 Fed. Rep. 564, it was held that an attorney for both parties might testify as to negotiations leading up to a trust deed; but, in a late New York case, it is held that a lawyer who prepared a codicil to the will of a client, since deceased, and which codicil has been destroyed, may be, as a witness, required to state, if within his knowledge, whether such codicil was executed, and, if so, its contents, though he cannot, under the statute of that state, be required to testify to transactions or conversations leading up to its execution: *Fayerweather v. Ritch*, 90 Fed. Rep. 13. In that case it is held that when a document, whether a will, contract, or other instrument, has been executed, its contents are no longer confidential, that the reason for the rule of privilege ceases, and that the counsel may as properly testify to the contents as may any other witness who knows such contents: *Fayerweather v. Ritch*, 90 Fed. Rep. 13. A communication to a lawyer while acting as a notary is not privileged: *Aultman v. Daggs*, 50 Mo. App. 280; and a notary, though an attorney, must testify as to drawing a deed: *Mutual Life Ins. Co v. Corey*, 54 Hun, 493.

Papers, Documents, and Writings.—Confidential communications between an attorney and client, whether oral or written, concerning the matter to which the retainer relates, are not to be disclosed in court, unless the client waives his privilege. Hence, the privilege of an attorney or counselor extends to papers, documents, and writ-

ten instruments held by him on behalf of his client: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *Burnham v. Roberts*, 70 Ill. 19; *Anonymous*, 8 Mass. 370; *Robson v. Kemp*, 5 Esp. 53; *Taylor v. Blacklow*, 3 Bing. N. O. 235. A privileged communication placed in the hands of an attorney does not lose its character as such, though it passes from the lawyer's possession without fault on his part. The admissibility of a paper containing a confidential communication between client and attorney is not dependent upon the manner in which possession thereof was obtained from the attorney, but upon the inherent character of the communication itself. If the communication is privileged, it can only be deprived of that character by some unequivocal act on the part of the client himself: *Liggett v. Glenn*, 51 Fed. Rep. 381, 396, 397. Compare *Pulford's Appeal*, 48 Conn. 247. His privilege also extends to any information derived from books, papers, or writings, shown to him by the client, or placed in his hands as a professional man: *Matthews v. Hoagland*, 48 N. J. Eq. 455; *Crosby v. Berger*, 11 Paige, 377; 42 Am. Dec. 117; *Brard v. Ackerman*, 5 Esp. 119, 120. If an attorney is resorted to by a borrower to raise money for him, and the abstracts of the borrower are perused by him, on behalf of the lender, the attorney will not be allowed to give evidence concerning them against the borrower: *Doe v. Watkins*, 3 Bing. N. O. 421.

He is not obliged to produce books, papers, or documents intrusted to him professionally by his client, when called upon to do so in the course of judicial proceedings: *Laing v. Barclay*, 3 Stark. 38, 42; *Volant v. Soyer*, 13 Com. B. 231; *Parkhurst v. McGraw*, 24 Miss. 134; *Kellogg v. Kellogg*, 6 Barb. 116; *Greenough v. Gaskell*, 1 Mylne & K. 98; *Lynde v. Judd*, 3 Day, 499; *People v. Benjamin*, 9 How. Pr. 419; *Neal v. Patten*, 47 Ga. 73; *Dover v. Harrell*, 58 Ga. 572; *Lawrence v. Campbell*, 4 Drew, 485; *Hughes v. Biddulph*, 4 Russ. 190; *Bluck v. Galsworthy*, 2 Giff. 453; *Newton v. Chaplin*, 10 Com. B. 356; *Mills v. Oddy*, 6 Car. & P. 728; *Doe v. Seaton*, 2 Ad. & E. 171; *King v. Boddington*, 8 Dowl. & R. 726; *Jackson v. Denison*, 4 Wend. 558; *Durkee v. Leland*, 4 Vt. 612; *Brandt v. Klein*, 17 Johns. 335; *Adams v. Fisher*, 3 Mylne & C. 526; *Stokoe v. St. Paul etc. Ry. Co.*, 40 Minn. 545. A lawyer who has, as an attorney in a cause, been intrusted with papers by a third person, cannot be called upon by the opposite party to produce these papers in evidence: *Jackson v. Burtis*, 14 Johns. 391; and an attorney who has, in that capacity, received papers from a client, cannot be called to produce them in a cause, although he does not act therein as the attorney of the party: *Parker v. Yates*, 12 Moore, 520.

Nor is he required ordinarily to answer any questions concerning the nature or contents of books, papers, or documents intrusted to him professionally: *Kellogg v. Kellogg*, 6 Barb. 116; *Volant v. Soyer*, 13 Com. B. 231; *Jackson v. Denison*, 4 Wend. 558; *Brandt v. Klein*, 17 Johns. 335; *Stokoe v. St. Paul etc. Ry. Co.*, 40 Minn. 545; *King v. Boddington*, 8 Dowl. & R. 726. Thus, in an action against a mortgagor, the attorney of the mortgagee, who has the mortgage deed, cannot be compelled to produce it, if he objects to

do so; nor can he be compelled to give evidence of its contents, but he may be asked for what purpose the money was raised: *Marr-ton v. Downes*, 6 Car. & P. 381. But a combination between a party and his attorney, to prevent the court from compelling the production of important papers required as evidence, on a trial, by transferring the papers from one to the other, will not be tolerated. Hence, it has been held that such is not a case where the confidential communications of a client are sought to be disclosed, and that if the papers are required in evidence, and are needed for the purpose of identification, the attorney is, to that extent, bound to produce them, even if he can be protected from disclosing their contents: *People v. Sheriff*, 29 Barb. 622. In *Hawkins v. Howard, Ryan & M.* 64, an action against bankrupts, it was held that the solicitor to the assignees, who had been served by the plaintiff with a subpoena duces tecum, was bound to produce the books of the bankrupts, in order that entries, relating to the matters in issue, might be read: *Compare Doe v. Seaton*, 4 Ad. & E. 171.

While an attorney cannot be required to produce a paper nor to disclose its contents, where it was deposited with him by his client, yet he may be required to testify concerning its existence, and whether it is in his possession, for the purpose of authorizing the adverse party to give parol evidence of its contents, if the attorney has it, but refuses to produce it: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *Stokoe v. St. Paul etc. Ry. Co.*, 40 Minn. 545; *Brandt v. Klein*, 17 Johns. 335; *Dwyer v. Collins*, 7 Ex. 639; *Jackson v. M'Vey*, 18 Johns. 330; *Rhoades v. Selin*, 4 Wash. C. C. 715, 718; and he cannot excuse himself from stating as a witness how he obtained possession of a paper which is the basis of his client's suit, upon the ground that he might be violating professional confidence if required to testify: *Allen v. Root*, 39 Tex. 589; but he cannot be required to testify as to the condition and appearance of papers at the time they were intrusted to him as an attorney: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; as whether a document was stamped or not: *Wheatley v. Williams*, 1 Mees. & W. 533; or whether or not a note placed in his hands by a client was indorsed, or had other writing upon its back: *Dietrich v. Mitchell*, 43 Ill. 40; 92 Am. Dec. 99. The fact that communications to an attorney were made in the form of deeds or notes does not exclude them from the protection of the statute and the general principle affecting privileged communications. Hence, a lawyer cannot be called upon to testify respecting the condition and appearance of a deed of trust and trust notes, at the time of his employment, to bring a suit of foreclosure upon them: *Gray v. Fox*, 43 Mo. 570; 97 Am. Dec. 416; or whether, when he first saw an account in the hands of his client, the evidence of settlement was indorsed on it: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; or as the contents of an indorsement on a note: *Arbuckle v. Templeton*, 65 Vt. 205; *Crawford v. McKissack*, 1 Port. 433. Compare *Driggs v. Rockwell*, 11 Wend. 504. The names, times, or dates contained in a written instrument, though not known from the communication of the client, yet come to the attorney's

knowledge from the delivery of the instrument by his client, and are ordinarily privileged: *Brard v. Ackerman*, 5 Esp. 119; *Jones v. Pugh*, 12 Sim. 470. But it has been held that, when a husband consults a lawyer with a view of taking out letters of administration on his wife's estate, and hands him the papers belonging to her, which are retained by him until after the husband's death, when it appears that the signature to a certain deed among the papers has been erased, there is no violation of professional confidence for the husband's attorney to testify as to the delivery of the papers, the date of the delivery, and by whom delivered and in what condition they were found after the wife's death: *Turner v. Warren*, 160 Pa. St. 336. A lawyer cannot be compelled to produce in evidence a paper which was left with him by a client in another case: *Lynde v. Judd*, 3 Day, 499.

An attorney will not be required to produce letters which have passed between himself and his client in a professional relation, such as those having relation to the business in hand, as where legal advice is sought upon the question in dispute, or upon any other matter connected with the confidential relation: *Parkhurst v. McGraw*, 24 Miss. 134; *Nelson v. Becker*, 32 Neb. 99, 193; *Fire Assn. v. Fleming*, 78 Ga. 733; *Arnold v. Chesebrough*, 41 Fed. Rep. 74; *Selden v. State*, 74 Wis. 271; 17 Am. St. Rep. 144; *Matter of Whitlock*, 51 Hun, 351; *Hughes v. Garnons*, 6 Beav. 352; *Garland v. Scott*, 3 Sim. 396; *Charlton v. Coombes*, 4 Giff. 372; *Jenkyns v. Bushby*, L. R. 2 Eq. 547; *Vent v. Pacey*, 4 Russ. 193. Thus, a plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although it was had before any litigation was in contemplation: *Minet v. Morgan*, L. R. 8 Ch. App. 361. So correspondence between a district attorney, representing the United States, and the attorney general, is confidential in its nature and cannot be cited by third persons: *United States v. Six Lots of Ground*, 1 Woods, 234. And letters from a husband to his wife, which the latter places in the hands of her attorney, are confidential communications, which the attorney has no right to produce in court as evidence against the husband: *Selden v. State*, 74 Wis. 271; 17 Am. St. Rep. 144. Correspondence between codefendants after the institution of a suit is not, as a general rule, privileged from production; but if one of the defendants is a solicitor, and has acted as agent for the solicitor on the record, to collect evidence in the suit, the letters which have passed between him and his codefendant are privileged communications: *Hamilton v. Nott*, L. R. 16 Eq. 112. A letter written between codefendants respecting a matter in litigation, with direction to forward it to their joint solicitor, is privileged from production: *Jenkyns v. Bushby*, L. R. 2 Eq. 547; and a solicitor cannot be required to produce letters written to him by his client about the time and concerning a matter, which has been impeached by a bill as fraudulent, where the solicitor was not made a party or charged with the fraud: *Charlton v. Coombes*, 4 Giff. 372.

There are circumstances, however, where letters passing between a lawyer and client must be produced. Thus, a solicitor acting as *particeps criminis*, and not in the true relationship of solicitor and client, is bound to produce the documents concocted between him and his client: *Reynell v. Spyre*, 11 Beav. 618. In an action by cestuis que trust against their trustees to compel them to make good a breach of trust, it was held that the trustees must produce letters and copies of letters from and to their solicitors in relation to matters in question in the action ante litem motam: *In re Mason*, L. R. 22 Ch. Div. 609; *Talbot v. Marshfield*, 2 Drew & S. 549. If an attorney does not wish to produce correspondence, he must show it to be of a confidential character: *Walsh v. Trevanion*, 15 Sim. 577, 578. He may be compelled to produce letters not communicated to him by his client: *Crosby v. Berger*, 11 Paige, 377; 42 Am. Dec. 117; and he may be compelled to produce a letter in his possession which passed between the litigants: *Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156.

If an attorney communicates the contents of a document which has been confidentially intrusted to him, or suffers another to take a copy thereof, such contents are admissible in evidence, notwithstanding the original documents are privileged: *Calcraft v. Guest* [1898], 1 Q. B. 759; and where the question is, whether a sale of certain machinery by an agent was made for the principal or for a third person, the attorney of the principal may be compelled to testify that he received a check from the principal with which to pay the fees and charges of the person who had made a sale thereof under a chattel mortgage, and that he paid such fees and charges therewith: *Aultman v. Ritter*, 81 Wis. 395. So, where a lawyer is also an "abstractor of titles," and is employed and paid for services in examining the title, et cetera, but not as a lawyer, and, during the transactions the parties make important statements touching the sale of the land, which is a homestead, and which affect the wife of the vendor, it is error to exclude the testimony of the lawyer, if called as a witness, on the ground that the conversations detailed by the witness were privileged communications, for a conveyancer is not necessarily an attorney or legal adviser: *Stallings v. Hullum*, 79 Tex. 421, 425. And an attorney may be required to testify as to the name of the persons who intrusted him with papers, and the purpose for which they were so intrusted, unless they were received by him from his client or his agent for the purpose of prosecuting or defending the rights of the client: *Reynolds v. Rowley*, 3 Rob. 201; 38 Am. Dec. 233. In a murder trial, upon cross-examination of the defendant as to a certain statement made by him, he may be asked whether he had not inclosed a statement, in a sealed envelope, addressed to his counsel, with instructions that it was to be opened if he was convicted, and to be returned unopened if not convicted, and the objection that the statement was privileged is not tenable: *People v. Durrant*, 116 Cal. 179, 219. The rule that an attorney is not obliged to produce a writing intrusted to him by his client, or to disclose its contents, without

the client's consent, does not extend to writings obtained by attorneys from other sources than their clients, or from third parties, whether strangers or adverse parties: *Davis v. New York etc. Ry. Co.*, Minn., Nov., 1897; *Crosby v. Berger*, 11 Paige, 877; 42 Am. Dec. 117.

Unlawful Purpose—Fraud—Crime.—If professional communications have, for their object, the commission of a felony or other crime *malum in se*, they are not privileged. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. Such relation exists for a lawful purpose only, and criminal design must be disclosed. If the attorney and client both engage in committing a crime, the client cannot prevent a disclosure of the transaction by the attorney, on the ground that the latter became acquainted with the facts connected with it as his legal adviser; and the attorney would, of course, have to testify, if called upon. If the attorney did not participate in the crime, the confidential relation, in such cases, is not one of which he can avail himself by refusing to testify: *Dudley v. Beck*, 3 Wis. 274; *People v. Sheriff*, 29 Barb. 622; *Hughes v. Boone*, 102 N. C. 137; *Orman v. State*, 22 Tex. App. 604; 58 Am. Rep. 662; *Hamil v. England*, 50 Mo. App. 338; *Matthews v. Hoagland*, 48 N. J. Eq. 455; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *State v. Kidd*, 89 Iowa, 54; *State v. Swafford*, 98 Iowa, 362; *Graham v. People*, 63 Barb. 468, 484; *Hamil v. England*, 50 Mo. App. 338.

Thus, communications made by a client to his attorney before the commission of a crime, such as murder, and for the purpose of being guided or helped in its commission, are not privileged, although the attorney was innocent: *Orman v. State*, 22 Tex. App. 604; 58 Am. Rep. 662; *Everett v. State*, 30 Tex. App. 682. So a communication made to an attorney, by a person seeking professional advice or assistance to enable him to commit a forgery, is not privileged, and the attorney, when called as a witness, can be required to disclose it: *People v. Blakeley*, 4 Park. C. C. 176; *People v. Mahon*, 1 Utah, 205; *Regina v. Avery*, 8 Car. & P. 596; *Regina v. Jones*, 1 Den. C. C. 169. "Professional communications," says Champlin, J., in *People v. Van Alstine*, 57 Mich. 69, 79, which was an information for forgery, "are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime." But statements and communications regarding the commission of a crime already committed, made by the party who committed it, to an attorney, consulted as such, are privileged communications, whether a fee has or has not been paid, and whether a prosecution or litigation is pending or not: *Alexander v. United States*, 138 U. S. 853, 858; *State v. Hazleton*, 15 La. Ann.

72; *People v. Atkinson*, 40 Cal. 284; *State v. Calhoun*, 50 Kan. 523; 84 Am. St. Rep. 141; *Lewis v. State*, 91 Ga. 168; *Rex v. Dixon*, 3 Burr. 1687; *Graham v. People*, 63 Barb. 468; *State v. Douglass*, 20 W. Va. 770. A prosecuting attorney cannot testify to what prosecuting witnesses have divulged to him: *State v. Houseworth*, 91 Iowa, 740; *Vogel v. Gruaz*, 110 U. S. 311; except, perhaps, when it is necessary or desirable to show the prisoner's innocence: *Marks v. Beyfus*, L. R. 25 Q. B. Div. 494. Compare *People v. Hillhouse*, 80 Mich. 580; *Rex v. Brewer*, 6 Car. & P. 363.

The former attorney of a prisoner may, however, according to the principles above stated, in this note, disclose confidential communications, made to him after he has refused to act for the prisoner: *People v. Hess*, 8 N. Y. App. Div. 143; 11 N. Y. Crim. Rep. 363. So a communication from a person charged with crime to an attorney is not privileged where the relation of attorney and client did not exist between them: *Basye v. State*, 45 Neb. 261. And if an attorney is called into consultation by an intoxicated client, what the attorney then observes, in common with other persons, as to the client's condition of intoxication, is not in the nature of a privileged communication, and he may be required to testify: *State v. Fitzgerald*, 68 Vt. 125. Conversations between a prosecuting witness and the state attorney's voluntary assistant, are not privileged in a subsequent action against such witness for malicious prosecution: *Meysenberg v. Engelke*, 18 Mo. App. 346; and an officer who hears a consultation between a prisoner and his attorney may testify thereto: *Cotton v. State*, 87 Ala. 75.

In some instances, the court has ordered an attorney to be examined as a witness against his client in cases of fraud: *Reynell v. Sprye*, 11 Beav. 618; *Gore v. Bowser*, 5 De Gex & S. 30; *State v. Kidd*, 89 Iowa, 54; but compare *Mornington v. Mornington*, 2 Johns. & H. 697. In *Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642, it was held that statements of a fraudulent grantor, made to the grantee's attorney regarding the former's purpose in making the conveyances and assignments of his property, were not privileged, as against such grantor, but that the attorney might testify to them in favor of the grantee in a suit brought against him by the grantor for a reconveyance. But in *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189, communications to an attorney employed to draw a conveyance or mortgage, fraudulent as to creditors, were held to be privileged. Contra, see *Hamil v. England*, 50 Mo. App. 338. So one who enters into a corrupt scheme with an attorney to defeat the collection by the county of the costs of a criminal prosecution against the former, may, in proceedings to disbar the attorney, testify as to the details of the scheme: *State v. Cadwell*, 16 Mont. 119. It has been held that an attorney cannot be asked whether he drew an instrument for a lawful or unlawful purpose: *Doe v. Harris*, 5 Car. & P. 592; as what was the intent or purpose of a debtor in making an assignment of certain contracts: *Hollenbeck v. Todd*, 119 Ill. 543. Communications to counsel in cases of fraud, where the state is concerned, have been held not privileged:

Hughes v. Boone, 102 N. C. 137. "Serious uncertainty has undoubtedly existed as to whether a fraudulent purpose in the subject matter of the employment deprives the client of the right to close the lips of counsel, or whether the rule of privilege extends to communications, the objects of which may have been the furtherance of fraud": **Matthews v. Hoagland**, 48 N. J. Eq. 455, 463, per Green, V. C. "It is as contrary to the duty of an attorney, or a counselor, to aid his client, by professional services, in the perpetration of a fraud, or in the violation of any law of the state, as it is to aid him in the commission of a felony; although the moral turpitude of the act may be much greater in the one case than in the other. I can, therefore, see no good reason for extending the principle of privileged communications to the first class of cases, and not to the last. The practice, however, appears to have been otherwise for more than a century and a half; and I do not now feel authorized to adopt a new rule on the subject": **Bank of Utica v. Mersereau**, 3 Barb. Ch. 528; 40 Am. Dec. 189, per Walworth, chancellor. In order that the rule of privileged communications may apply, "there must," says Green, V. C., in **Matthews v. Hoagland**, 48 N. J. Eq. 455, 469, "be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by fraud. As I understand the case, the rule, in its different phases and reasons, may be thus stated: If the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it, there is no privilege, for it is no part of an attorney's duty to assist in crime—he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the co-operation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy, which, on its accomplishment by the commission of the overt act, becomes criminal and an indictable offense. If the client discloses his fraudulent purpose and the attorney does not join in the scheme, but repudiates all connection with it, there cannot be, properly speaking, professional employment to effect such purpose, and consequently there is no privilege; if the client does not frankly and freely disclose his object and intention, as well as the facts, there is no professional confidence, and consequently no privilege. The application of the rule proceeds on the ground that the privilege is that of the client, and bases his right to claim it, or liability to lose it, on his own conduct; if that has been such

that his criminal and fraudulent object and purpose puts him beyond the pale of the law's protection, or if, to conceal his purpose, he has not reposed full confidence in his counsel, he cannot invoke a rule which the law has created, as Lord Brougham said, in *Greenough v. Gaskill*, 1 Mylne & K. 98, 'out of regard to the interests and the administration of justice.' " In a late English case, it is held that where fraud is alleged against a defendant, communications between himself and his solicitor as to the subject matter of the alleged fraud are not privileged from production, there being no distinction in this respect, it is said, between a crime and a civil fraud; and the question as to whether the solicitor is or is not a party to the alleged fraud is considered to be immaterial: *Williams v. Quebrada Ry. etc. Co.* [1895], 2 Ch. 751, where the preceding case of *Queen v. Cox*, 14 Q. B. Div. 153, was considered. The case of *Williams v. Quebrada Ry. etc. Co.* [1895], 2 Ch. 751, was considered one of "unusual gravity and importance," and Kekewich, J., in delivering the opinion of the court said: "It is of the highest importance, in the first place, that the rule as to privilege of protection from production to an opponent of those communications which pass between a litigant, or an expected or possible litigant, and his solicitor should not be in any way departed from. However hardly the rule may operate in some cases, long experience has shown that it is essential to the due administration of justice that the privilege should be upheld. On the other hand, where there is anything of an underhand nature, or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the court." However this may be, it is clear that a lawyer, who has advised and assisted in perpetrating a wrong, cannot afterward be allowed to use the knowledge he has acquired to secure a pecuniary benefit to himself, by attacking the proceedings he has advised and conducted, to consummate the wrong: *Hatch v. Fogerty*, 40 How. Pr. 492.

Persons to Whom Privilege Extends.—The privilege of exemption from testifying to facts actually known to a witness is in contravention to the general rules of law; it is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy upon which it is allowed. Except as otherwise provided by statute, it is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other, such as an interpreter, agent, or attorney's clerk: *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Scales v. Kelley*, 2 Lea, 706; *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513. The privilege does not extend to a mere student at law in the attorney's office, not the attorney's clerk, although the client supposed he was an attorney: *Barnes v. Harris*, 7 Cush. 576; 54 Am. Dec. 734; *Schubkagel v. Dierstein*, 131 Pa. St. 46; *Sibley v. Waffle*, 16 N. Y. 180, 183. Nor

does it extend to one not a lawyer, although the party supposed him to be a lawyer: *Brayton v. Chase*, 3 Wis. 456; *Home Fire Ins. Co. v. Berg*, 46 Neb. 600; *Sample v. Frost*, 10 Iowa, 266; *Holman v. Kimball*, 22 Vt. 555. Contra, *Benedict v. State*, 44 Ohio St. 679; *Bean v. Quimby*, 5 N. H. 94. In *Hawes v. State*, 88 Ala. 37, the principle of exemption from testifying was held not to extend to communications made by the defendant to the "confidential" clerk of a law firm, who, being asked by defendant if he was a lawyer, replied that he was not, and to whom the communications were then made without further inquiry or suggestion.

Attorney may Protect Himself, when charged with fraud by his client, or where both are charged with fraud. The object of the rule ceases, and the attorney is no longer bound by his obligation of secrecy, when his client or his representatives charge him, either directly or indirectly, with fraud or other improper or unprofessional conduct, and he may testify as to the facts: *Olmstead v. Webb*, 5 App. D. C. 38, 51; *Hunt v. Blackburn*, 128 U. S. 464, 470; *State v. Madigan*, 66 Minn. 10; *In re Postlethwaite*, L. R. 35 Ch. Div. 722; *Greenough v. Gaskell*, 1 Mylne & K. 98; *Nave v. Baird*, 12 Ind. 318. So, if his client sues him, he may testify, but should not disclose more than is necessary for his own protection: *Mitchell v. Bromberger*, 2 Nev. 346; 90 Am. Dec. 550. If a party testifies as to confidential matters, such as letters from his attorney about the matters in issue, the attorney may testify: *White v. Thacker*, 78 Fed. Rep. 862.

Waiver—Becoming a Witness.—The obligation of secrecy, as we have seen, between attorney and client, is the client's privilege, and he may waive it; but the attorney cannot do so: *Tays v. Carr*, 37 Kan. 141; *Passmore v. Passmore*, 50 Mich. 626; 45 Am. Rep. 62; *Sleeper v. Abbott*, 60 N. H. 162; *Hunt v. Blackburn*, 128 U. S. 464, 470; *Louisville etc. R. R. Co. v. Hill*, 115 Ala. 334, 350; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599. If a privileged communication is waived by a client, it does not render the attorney an incompetent witness: *Chase's case*, 1 Bland, 206; 17 Am. Dec. 277; *Benjamin v. Coventry*, 19 Wend. 353. When a privileged communication is made by, or affects, several clients, a majority of them cannot waive the privilege and authorize the attorney to disclose the communication against the expressed wish of any one of such clients, though such dissenting client is not a party to the suit in which the attorney is called to testify: *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189. If the client waives his privilege the attorney may be compelled to testify: *Benjamin v. Coventry*, 19 Wend. 353; *Hamilton v. People*, 29 Mich. 173, 184. But a client does not waive or lose his privilege by becoming a witness and testifying in his own behalf. And, if he gives evidence in his own behalf, he cannot, on cross-examination, be compelled to divulge statements made by him during a confidential consultation between himself and his attorney, and as to which he did not testify on his direct examination: *Hemenway v. Smith*, 28 Vt. 701; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 406; *Duttenhofer v. State*,

84 Ohio St. 91; 82 Am. Rep. 362; Barker v. Kuhn, 38 Iowa, 392; State v. White, 19 Kan. 445; 27 Am. Rep. 137, and extended note; Bigler v. Reyher, 48 Ind. 112; Oliver v. Pate, 43 Ind. 132. Contra, King v. Barrett, 11 Ohio St. 261; Inhabitants v. Henshaw, 3 Am. Rep. 838; at least so far as the witness discloses confidential communications in his testimony; Oliver v. Cameron, 4 McAr. 237; Swenk v. People, 20 Ill. App. 111; Oliver v. Pate, 43 Ind. 132. Compare Louisville etc. R. R. Co. v. Hill, 115 Ala. 334; also Jones v. State, 65 Miss. 179; Alderman v. People, 4 Mich. 414; 69 Am. Dec. 321, as to accomplices. A client does, however, waive his privilege by calling his attorney as a witness, which he may do, to testify: Crittenden v. Strother, 2 Cranch C. C. 464; Moats v. Rymer, 18 W. Va. 642; 41 Am. Rep. 708; Rowland v. Plummer, 50 Ala. 182; Smith v. Orego, 54 Hun, 22; Alexander v. Harrison, 38 Mo. 258; 90 Am. Dec. 481; Riddles v. Aiken, 29 Mo. 453; and not claiming the privilege may amount to a waiver: Mayor v. Holdsworth, 10 Sim. 476; Walsh v. Trevanion, 15 Sim. 577; Thomas v. Rawlings, 27 Beav. 140. It is entirely competent for an heir at law of the client to call upon an attorney to testify in regard to facts touching his interests, of which the attorney acquired knowledge, alone, from a professional consultation with the client: Fossler v. Schriber, 38 Ill. 172. If the rights and interests of the client, and those claiming under him, and third persons, come in conflict, the privilege of communications to his attorney is not removed by the client's death, though the rule seems to be otherwise in cases of testamentary dispositions: Scott v. Harris, 113 Ill. 447. The client may testify to confidential communications divulged to his attorney, for there is no rule of law to prohibit it: Scott v. Harris, 113 Ill. 447; but the death of the client does not render such testimony competent on the part of the attorney: Carter v. West, 93 Ky. 211; Vought v. Vought, 50 N. J. Eq. 177; Dowle's Estate, 135 Pa. St. 210; unless the communications were made in some irregular way that would admit them, as in the presence of both parties to the transaction: Hummel v. Kistner, 182 Pa. St. 216. In New York, it is held that the declarations of a testator or intestate binding on him or his estate may be given in evidence against his personal representative in all cases where they would have been competent against himself had he been living and a party to the action: Hurlburt v. Hurlburt, 128 N. Y. 420; 26 Am. St. Rep. 482.

Duty and Power of Court.—Whether a communication is privileged is for the court to decide: Coveney v. Tannahill, 1 Hill, 33; 37 Am. Dec. 287; Childs v. Merrill, 66 Vt. 302; Hughes v. Boone, 102 N. C. 137; Moore v. Terrell, 4 Barn. & Adol. 870; and where a communication is found to be privileged a court will neither require nor permit an attorney to testify respecting it, against the client's consent, although he is willing to do so. On the contrary, it is the duty of the court to protect the client against the effect of such evidence: Thorp v. Goewey, 85 Ill. 611, 615; People v. Barker, 56 Ill. 299; Jenkinson v. State, 5 Blackf. 465; Getzlaff v. Seliger, 43 Wis. 297; Hughes v. Boone, 102 N. C. 137; Heister v. Davis, 3 Yeates,

4; King v. Barrett, 11 Ohio St. 261; Beltzhoover v. Blackstock, 8 Wata, 20; 27 Am. Dec. 330; Minet v. Morgan, L. R. 8 Oh. App. 361. If the attorney's memory, while testifying, is defective as to whether the communication was privileged or not, the client should have the benefit of the doubt, and the testimony should be excluded: People v. Atkinson, 40 Cal. 284. Ordinarily, the attorney's oath that a matter was confidentially communicated, is conclusive, unless it appears from the nature of the question, that the principle of protection does not extend to it, as whether he was an attesting witness to a deed. And the rule is the same in equity as at law: Morgan v. Shaw, 4 Madd. 54, 57.

MORRIS v. COLUMBUS.

[102 GEORGIA, 792.]

MUNICIPAL CORPORATIONS—JURISDICTION OF PERSONS.—The legislature may give a city jurisdiction of a person who comes within its limits, but, even in the absence of express legislative authority, municipal ordinances have the same effect upon persons who come within the city limits as they have upon regular inhabitants.

POLICE POWER—RESTRAINT OF LIBERTY.—DANGER TO PUBLIC HEALTH is a sufficient ground for the exercise of the police power in restraint of a person's liberty.

VACCINATION—AUTHORITY TO COMPEL—POLICE POWER.—The legislature has power to pass an act compelling vaccination, and, whenever an epidemic of smallpox is existing, or may be reasonably apprehended, it may, in the exercise of its police power, confer upon a municipal corporation authority to make and enforce ordinances requiring all persons who come within its limits to submit to vaccination.

VACCINATION—WISDOM OR POLICY OF LAWS AS TO—COURTS DO NOT DEAL WITH.—The courts have nothing to do with the wisdom or policy of a law requiring persons to submit to vaccination.

Certiorari. The plaintiffs, Morris and others, were convicted of violating a city ordinance, requiring vaccination, and sued out a writ of error upon the refusal of the court to sustain the writ of certiorari.

C. J. Thornton and Cameron & Hargett, for the plaintiffs in error.

Francis D. Peabody, for the defendant in error.

⁷⁹³ **COBB, J.** In 1890 the general assembly conferred upon the mayor and aldermen of the city of Columbus authority to "declare by resolution that vaccination shall be compulsory upon all persons living in the county of Muscogee, or any part there-

of," the resolution to provide "the time within which all persons living in said county, or any part thereof, shall be vaccinated"; the act further providing that "any person failing to be vaccinated within the time required in said resolution shall, upon conviction," be punished as therein prescribed: Acts 1890-91, p. 508. On August 7, 1897, the city council passed a resolution for compulsory vaccination of each and every person resident of that city, over the age of two years, and of all persons nonresident who were employed in the city, excepting such as would produce physicians' certificates that they had been successfully vaccinated since January 1, 1897, or that such person was an immune, or was in such state of health that vaccination would be dangerous; provided, that any person should have the right to be vaccinated by the physician of his choice. Two days later the city council passed a further resolution, that all persons residing within a radius of three miles from the city should be vaccinated within ten days from its passage, except such persons as might produce a certificate of a reputable physician that vaccination was not necessary or would be dangerous in a given case. Each of these resolutions provided a penalty for its violation. On September 13, 1897, a further resolution was passed, providing for a house to house vaccination, with penalty for failing or refusing to be vaccinated. Morris, Newsom, and Yarbrough were arraigned before the recorder's court for a violation of these resolutions. Upon conviction, they each applied to the superior court for a writ of certiorari, and the refusal of that court to sustain the certiorari is the error assigned here. From the record it appears that plaintiff in error Morris resided outside of the city ⁷⁹⁴ limits, in Muscogee county, but was an employé of a factory within the city limits and was at the factory at the time he refused to be vaccinated or to produce a certificate of a physician showing that he was within any of the exceptions enumerated in the resolution. Newsom and Yarbrough were residents of the city. Morris excepted to the decision of the recorder, on the ground that that court had no jurisdiction of him; and because the resolution, the violation of which was charged, was illegal and unconstitutional. Newsom and Yarbrough excepted on the grounds that the recorder's court refused to grant them time to procure counsel and prepare their defense; that the evidence was not sufficient to authorize the judgment; that no necessity appeared for the enforcement of the resolution; and that the same is unconstitutional and void. It appears from the record that there was no smallpox in the

city when the plaintiffs in error refused to be vaccinated or to furnish a certificate, but there was smallpox in the city when the two resolutions were passed by council; that the disease is one which grows more prevalent in winter; and that there was smallpox at the date of the trials in the city of Birmingham, Alabama.

All of the plaintiffs in error attack the constitutionality of the act of the general assembly conferring authority upon the city council of Columbus to require vaccination in certain cases. Before discussing this question, we will dispose of the other questions raised by the petitions for certiorari. Plaintiff in error Morris contends that the court had no jurisdiction of him, because he was a nonresident of the city, although he lived but three hundred feet from the city limits and in Muscogee county. The general assembly, by an act approved November 15, 1895, amendatory of the act of 1890, creating a new charter for the city of Columbus (Acts 1895, p. 158), gave jurisdiction to the mayor and aldermen of Columbus over all persons living within a radius one mile and a half from the city limits, so far as requiring vaccination was concerned; and if the legislature had power to pass this act (and it is not contended that it did not), then it follows that the recorder's court had jurisdiction to try and punish any person within the prescribed ⁷⁹⁵ limits for a violation of the city's ordinance. It is not necessary, however, to decide in this case whether or not the general assembly could give the municipal authorities jurisdiction over persons who lived outside the city limits and do not come into the city; or whether or not the authorities have transcended their power in passing an ordinance designed to effect persons living further from the city than one and a half miles, as the question raised by plaintiff in error Morris is whether or not the city authorities have jurisdiction over a person who, while he has his legal residence outside of the city limits, is actually in the city during the day while engaged in his employment. As we have seen, this power was expressly conferred upon the municipal authorities by the legislature, and it is certain that the legislature could give the city jurisdiction over such a person. If this were not true, vaccination, if efficacious, would afford scant protection to the inhabitants, when persons living outside of the city and who had been exposed to the contagion might come into the city and scatter it broadcast among them before they had been inoculated and thus rendered immune. But even without express legislative permission, it is the current of au-

thority that municipal ordinances have the same effect upon persons who come within the limits of a city, as they have upon regular inhabitants: 1 Dillon on Municipal Corporations, sec. 355; Bott v. Pratt, 33 Minn. 323; 53 Am. Rep. 47; Buffalo v. Webster, 10 Wend. 100; Wilmington v. Roby, 8 Ired. 250; City Council v. Pepper, 1 Rich. 364; Kennedy v. Sowden, 1 McMull. 323; Knoxville v. King, 7 Lea, 441; Folmar v. Curtis, 86 Ala. 354.

The next point raised by the petitions for certiorari is, that there was no necessity for the enforcement of the ordinance. The right to enforce vaccination (assuming for the present that its enforcement is constitutional) is derived from necessity; and although the authority conferred upon the municipal corporation of Columbus is very broad, still we cannot assume that the legislature intended that they should exercise this authority save in cases of necessity. Did the necessity for the enforcement of the ordinance against the plaintiffs in error exist? We think there can be no question, under the facts appearing in ^{the} record, that the municipal authorities had reasonable grounds for apprehending that an epidemic of smallpox was imminent. While the disease did not exist in the community at the time of the trial, it was prevalent in Birmingham, an adjacent city; it was present in Columbus when the resolution was adopted; and winter was approaching, at which season the disease is more highly contagious than at any other time. Taking these facts into consideration, we think the authorities were warranted in enforcing the ordinance unless it invaded some constitutional right of the plaintiffs in error. And this brings us to a discussion of the main question in the case. Before doing so, however, it may be well to remark that a number of objections that are usually urged against compulsory vaccination cannot be considered under an exception to the constitutionality of the law. Other than as above indicated, no attack has been made on the ordinance itself. The municipal authorities have carried into execution the power conferred upon them by the general assembly. They have, it would seem, in no way transcended that power. The ordinance is aimed only at those who have not been vaccinated within a certain time, who are not immune, or who have not furnished a certificate from some physician that the injection of the virus into their system would be injurious. It is even more liberal than that; it allows to every person the privilege of being inoculated by the physician of his choice. There can be no question that this is a reasonable exercise of

the power conferred upon the city authorities by the legislature. With the wisdom or policy of vaccination the courts have nothing to do. We do not propose to enter into a discussion as to whether or not it is a preventive of smallpox. That question is not proper subject matter for review by the courts. The legislature has seen fit to adopt the opinion of those scientists who insist that it is efficacious, and this is conclusive upon us. Our only province is to see that none of the rights guaranteed to the plaintiffs in error by the fundamental law are infringed. "What is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it ⁷⁸⁷ is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful": Cooley's Constitutional Limitations, 155. See, also, *Powell v. Pennsylvania*, 127 U. S. 678. No law which infringes any of the natural rights of man can long be enforced. Under our system of government, the remedy of the people, in that class of cases where the courts are not authorized to interfere, is in the ballot-box. Any law which violates reason, and is contrary to the popular conception of right and justice, will not remain in operation for any length of time, but courts have no authority to declare it void merely because it does not measure up to their ideas of abstract justice. The motive which doubtless actuated the legislature in the passage of the act now under consideration was that vaccination was for the public good. In this the general assembly is sustained by the opinion of a great majority of the men of medical science both in this country and in Europe.

The general assembly conferred this authority upon the city of Columbus in the exercise of its police power, by which, says Tiedeman, "state, persons, and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state." The supreme court of Illinois has said of this power that it is "coextensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent power in the state, which enables it to prohibit all things hurtful to the comfort and welfare of society": *Lakeview v. Rose Hill Cemetery Assn.*, 70 Ill. 192; 22 Am. Rep. 71. The court of appeals of New York says: "The police power extends to the protection of persons and property within the state. In order to secure that protection

they may be subjected to restraints and burdens by legislative acts. If the act is a valid and reasonable exercise of the police power of the state, then it must be submitted to, as a measure designed for the protection of the public and to secure it against some danger, real or anticipated, from a state of things which modifications in our social or commercial life have brought about. The natural right to life, liberty, and the pursuit of happiness ⁷⁹⁸ is not an absolute right. It must yield whenever the concession is demanded by the welfare, health, or prosperity of the state. The individual must sacrifice his particular interest or desires, if the sacrifice is a necessary one, in order that organized society as a whole shall be benefited": *People v. Warden of City Prison*, 144 N. Y. 529. We cannot see what there is in the present case to differentiate it in principle from a number of other cases in which private rights have been subordinated to the health and comfort of the public. Danger to public health has always been regarded as a sufficient ground for the exercise of police power in restraint of a person's liberty. The right of a state to enforce quarantine laws in the interest of public health, or to abate nuisances which are of a character likely to injure the health of a community, has rarely ever been questioned; and the power of the general government to prevent the landing in this country of immigrant foreigners infected with contagious diseases has long been established: See *Harrison v. Baltimore*, 1 Gill, 264; *Parker and Worthington on Public Health and Safety*, sec. 26, p. 35; *Prentice on Police Power*, 105, 106. It is not our purpose, nor would it be profitable here, to enter into any extended discussion as to what things are included in the general police powers of the state. In general, it may be said, in the language of the supreme court of the United States, that "it is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance": *Lawton v. Steele*, 152 U. S. 133. *Tiedeman* in his work on *Limitations of Police Power*, page 32, recognizes the right of a state to pass laws requiring vaccination. He says: "It seems that medical and surgical treatment can be prescribed, against the consent of the individual, as a preventive of contagious and infectious diseases. Thus in England, and probably in some of the United States, vaccination has been made compulsory." And we may add just here that at the present time a great majority of the United States have such laws. In *Parker and Worthington on Public*

Health and Safety, section 123, the doctrine is stated broadly as follows: "It is sometimes provided by law ⁷⁹⁹ that persons who may have been exposed to contagion or who come from places believed to be infected, and particularly children attending the public schools, shall submit to vaccination, under direction of the health authorities. This requirement is a constitutional exercise of the police power of the state, which can be sustained as a precautionary measure in the interest of the public health." The cases cited support the text in principle. In the case of *Hazen v. Strong*, 2 Vt. 427, the court held that the municipal authorities of a certain town in Vermont had authority, under a general legislative power "to take the most prudent measures" to prevent the spread of smallpox, to levy and collect a tax for the purpose of defraying the expenses of having the inhabitants inoculated with the "kine-pox." It was conceded in that case by both sides that the town would have authority to levy and collect the tax in question under certain circumstances, that is, where the danger of an epidemic of smallpox was imminent. The analogy between this case and cases like the present is apparent. In *Prentice on Police Power*, 133, 134, there is a discussion of a number of laws providing for compulsory vaccination, and also a few cases in which the manner of the exercise of the power was brought in question. After discussing these at length, the author concludes in these words: "The presumption that under the law and ordinances cited vaccination was a lawful act would appear conclusive from these cases, and the only questions which would remain are those of negligence and willful wrongs." So far as we are aware no court has ever been called upon to pass on this exact question, but there are a few decisions in which the subject of vaccination is discussed, and these show the trend of the judicial mind on the subject. In the *Matter of Smith*, 146 N. Y. 68; 48 Am. St. Rep. 769, was a case in which Smith and another were detained in quarantine under a resolution of the municipal authorities of the city of Brooklyn, declaring that "whenever any person in said city shall refuse to be vaccinated, such person shall immediately be quarantined, and detained in quarantine until he consents to such vaccination." The court of appeals of New York reversed the supreme court, general term, for refusing to order the release of the ⁸⁰⁰ persons detained. But the decision was put upon the ground that the power conferred upon the local legislature of Brooklyn was not sufficiently broad to cover the case of the appellants. In discussing the case, Gray,

J., says: "I think no one will dispute the right of the legislature to enact such measures as will protect all persons from the impending calamity of a pestilence, and to vest in local authorities such comprehensive powers as will enable them to act competently and effectively. . . . The question here is, not whether the legislature had the power to enact the provisions of section 24 of the health law, but whether the respondent has shown that a state of facts existed warranting the exercise of the extraordinary authority conferred upon him." In *Potts v. Breen*, 167 Ill. 67, 59 Am. St. Rep. 262, it was held that a school board could not make vaccination a condition precedent to admission to the public schools, when smallpox did not exist in the community, and when there was no reason for apprehending an epidemic of that disease, in the absence of express authority from the legislature. An examination of the opinion of the court shows, that while the question was not presented, they were clearly of the opinion that compulsory vaccination would be allowable in certain cases where express legislative authority was given. The court uses this language: "It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, *except when necessary for the public health and in conformity to law* [italics ours], be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be." There are several cases, holding that acts of the legislature authorizing school boards to require vaccination as a condition precedent to admission to the public schools is not an invasion of any constitutional right of the pupil: *Duffield v. Williamsport School Dist.*, 162 Pa. St. 476; *Bissel v. Davison*, 65 Conn. 183; *Abeel v. Clark*, 84 Cal. 226; *In re Rebenack*, 62 Mo. App. 8; *In re Walters*, 84 Hun. 457. Pupils of schools constitute a general class of persons. If the legislature can ⁸⁰¹ authorize the imposition of this condition upon one class, why not upon another? If it can say that the penalty for refusing to be vaccinated must be a denial of the pupil's right or privilege to attend school, why can it not say to another general class, the penalty for your refusal to submit to vaccination shall be a fine or imprisonment? If the act can be upheld in the one case as constitutional, why not in the other? True, in the school cases the pupils may remain out of school; but unless vaccination is itself lawful, what right has a school board to deny admission to the schools until

this unlawful regulation is complied with. The school boards have no right to pass such a regulation unless the power is specifically conferred upon them by the legislature; and ought a condition precedent to compliance with an unconstitutional law be upheld? Can the cases be justified on any other theory than that the law itself is not unconstitutional? True, the child may avoid the consequences of the resolution by not entering school; and so the citizen may avoid the consequences of a municipal regulation by putting himself beyond the jurisdiction of the municipality. Indeed, this is a very effectual way of avoiding the consequences incident to a failure to comply with any law. Suppose the courts were to declare the act now under consideration repugnant to the constitution, would it be contended for a moment that the legislature could confer the same authority on a school board? Is there any good reason in law for the discrimination? There can be no legal reason for refusing to allow a child to invoke a law to secure him in his right, or privilege, whichever it may be termed, to attend a public school, which a citizen might rely on to secure him a residence in a given place. It seems to us, therefore, to be a necessary conclusion from the cases cited *supra*, holding a regulation requiring vaccination of pupils as a condition precedent to admission in the public schools reasonable and constitutional, that the act now under consideration is a valid exercise of the police power. Under this view the decision in the present case is supported by direct authority. But however this may be, we hold that the legislature has power to pass an act compelling vaccination, and that it may delegate this authority to a municipal ⁸⁰² corporation. But while this is true, municipal corporations must have express authority from the legislature, as no such power will ever arise by implication: *State v. Burdge*, 95 Wis. 390; 60 Am. St. Rep. 123; *Potts v. Breen*, 167 Ill. 67; 59 Am. St. Rep. 262. In no proper sense can the act of the general assembly attacked in this case be said to deprive the plaintiffs in error of any right without due process of law, or to deny to them the equal protection of the laws. It follows, therefore, that the superior court did not err in refusing to sustain the petitions for certiorari.

Judgment affirmed.

All the justices concurring.

JURISDICTION, WHETHER CIVIL OR CRIMINAL. ATTACHES to all persons found within the limits of the state or government over which the power of the court extends, whether they be permanent or temporary residents, and they will to that extent

is made and partly in other states, the law of the former controls its validity, and any stipulation which is invalid in the state where it is entered into is invalid everywhere.

JURY TRIAL--ESTOPPEL TO OBJECT TO INSTRUCTIONS.—If a litigant asks for instructions, which are not given, but similar instructions are given at the request of his adversary, the former is estopped from urging, on appeal, that such instructions are erroneous.

JURY TRIAL—IMPROPER REMARKS OF COUNSEL.—If, when a remark is made by counsel in the course of his argument before a jury, it is objected to and the court sustains the objection, and no further action or ruling upon the subject is requested, such remark does not constitute any ground for a reversal or a new trial.

Action to recover compensation for the death of Charles I. Beebe, alleged to have resulted from the negligence of the defendant corporation. He shipped certain livestock and household furniture from Webster City, Iowa, to West Lebanon, Indiana. At a station in Illinois, he entered the car, in which his stock was, for the purpose of watering and feeding it. Apparently before he had finished his work, the train was started, and he remained in the car until another station was reached, about twenty miles distant. There the train, on which he was riding, was subjected to a violent jerking and jumping, and he was thrown or fell out of the car, receiving injuries resulting in his death. The defendant corporation relied upon a contract between it and the decedent, which, among other things, stipulated that he would feed and care for his stock at his own risk and expense, that he would be given free transportation, but at his own risk of personal injury from any cause except the gross carelessness of the company, and that he must ride in the caboose. The jury returned a verdict in favor of the plaintiff, and defendant appealed.

Williams & Capen, for the appellant.

Fifer & Barry, and A. B. Davidson, for the appellee.

19 MAGRUDER, J. 1. At the close of the evidence the defendant presented to the court a written instruction, saying to the jury, "that there is no evidence to support a verdict for the plaintiff, if rendered in this case; and you are accordingly instructed to return a verdict for the defendant." This instruction was refused, and its refusal is assigned as error.

After a careful examination of the case, we are of the opinion that there was evidence tending to support the cause of action set up in the declaration, and, therefore, the court committed no error in refusing to take the case from the jury. The declaration

alleges, in substance, that the train having come almost to a standstill, the ²⁰ engineer negligently, carelessly, suddenly, violently, and without warning started the engine forward, and thereby, with great force and violence, jerked the car in which the deceased was a passenger, by means of which he was thrown down and out of it, and received the injuries from which he died.

One of the questions of fact in the case is, whether or not there was any unusual violence in the jerking or bumping of the car, beyond that which is inevitable to freight trains under the circumstances mentioned in the statement preceding this opinion. There was testimony on both sides of this question. Another question of fact was, whether the death of appellee's intestate was caused by the fall from the car, or by a kick which he is alleged to have received from one of the horses in the car. There is testimony on both sides of this question. Another question of fact was, whether or not the deceased was guilty of contributory negligence. Upon both sides of this question also there was much testimony. Upon all these matters of fact the jury were elaborately instructed, thirteen instructions having been given for the plaintiff, and eighteen for the defendant. Six of the instructions given for the defendant were first modified by the court before they were given. Six others asked by the defendant were refused. The verdict of the jury, and the judgment entered thereon in the circuit court, and the judgment of the appellate court affirming the judgment of the circuit court, are conclusive upon these question of fact, so far as this court is concerned.

It is the duty of a railroad company to have a good, substantial, and safe roadtrack for the use of its trains; and it is also its duty to see that its trains are properly managed. When a passenger is injured from a failure to perform this duty, the railroad company is guilty of negligence, for which it may be held responsible in damages. Where a passenger is lawfully upon a freight train, and arises, when the train comes to a standstill, either ²¹ for the purpose of alighting from the train, or for the purpose of feeding stock, where a contract with the company requires him to do so, and is injured by a sudden start of the train, or by an unusual jerking or bumping of the train, the jury will be justified in finding that the railroad company is guilty of negligence, if it be shown that the plaintiff was in the exercise of ordinary care for his safety at the time of the injury: *Florida Ry. & Nav. Co. v. Webster*, 25 Fla. 394; *Chicago etc. R. R. Co. v. Arnold*, 144 Ill. 261.

It is claimed that the deceased was guilty of contributory negligence upon the alleged ground that, when injured, he was in the car chartered by him where his horses and household goods were, instead of being in the caboose attached to the freight train. It is true that the contract required the deceased to "ride in the caboose attached to the train conveying the stock." But the contract also states that "the owner will feed, water, and take care of his stock at his own expense and risk." The contract must be so construed as to be consistent with itself. If the deceased was obliged to feed, water, and take care of his stock, he had the right to go into the car where the stock was in order to fulfill this obligation. Counsel for appellant claim that, while the train was in motion, it was the duty of the deceased to be in the caboose, and that only when the train stopped did he have any right to go to his own car to feed and water his stock. The evidence tends to show that, when the train stopped at La Salle, the deceased was in his own car, and was there engaged in watering his stock, and was assisted in so doing by the conductor and brakeman of the train. While he was thus engaged in feeding and watering his stock, the train suddenly started, and did not again stop, until it reached the place where the accident occurred. The stop made at La Salle would appear to have been a very short one, and not long enough to enable the deceased to finish the acts of attention ²² which he was giving to his stock. It was a fair question to be submitted to the jury whether, under all the circumstances, the servants of appellant in charge of the train did not fail to give the deceased sufficient time to feed and water his stock, and return to the caboose before the train started. After the train started, and while it was in motion, it was not possible for him to reach the caboose. It was a question, therefore, for the jury to determine, whether or not the deceased was guilty of contributory negligence in being in the car, and whether or not he was not forced to remain there by reason of the conduct of the servants of the appellant in causing the train to start before he had finished caring for the stock.

If there had been no provision in the contract of shipment requiring the deceased to feed and water his stock, it would have been the duty of the appellant to do so, and appellant would have been liable to the deceased for a loss or injury occurring to the stock, in case it had failed to discharge this duty. But inasmuch as, by the terms of the contract, the duty of caring for the stock was assumed by the deceased as the shipper thereof, the appellant was under obligations to afford him a reasonable

opportunity and reasonable facilities for doing what the contract required him to do. It failed to furnish him such reasonable opportunity and facilities if it refused to detain its train long enough at a proper stopping-place to enable him to feed and water his stock, and return to the caboose before the starting of the train: 5 Am. & Eng. Ency. of Law, 2d ed., 436, 437.

2. It is assigned as error by the appellant that the court gave certain instructions for the appellee upon the trial below. Complaint is made of the first and second of such instructions. These instructions announce, in substance, that such portion of the contract as required the intestate to be conveyed at his "own risk of personal injury from any cause whatever, except injuries arising from gross carelessness of the railroad company," was null and void, and of no binding effect. The question presented by the objection to these instructions is, whether a common carrier can, by contract, exempt itself from liability for negligence in the conveyance of a passenger, provided only such negligence is not gross in its character. Many of the cases make a distinction between negligence and gross negligence, and hold that a carrier may exempt itself from liability for the former, though not for the latter. Undoubtedly, the great weight of authority is in favor of the position that the carrier cannot, by contract, exempt itself from liability for ordinary negligence. It would certainly seem to be against public policy that a common carrier, owing a duty to the public to carry its passengers safely, and to exercise the highest degree of care and skill in doing so, should be allowed to exempt itself from liability for any degree of negligence, which should cause an injury to a passenger: 5 Am. & Eng. Ency. of Law, 2d ed., 618.

It is said, however, that in Illinois a carrier may by contract limit its liability for all negligence, except gross negligence. This rule has been laid down in some cases in reference to the shipment and carriage of property, but does not apply, when a carrier intends to limit its liability for personal injury to a passenger paying fare. Where a passenger was traveling in the cars of a railroad company upon a free pass given him by the company, and received injuries to his person, it has been held that a contract exempting it from liability for any other species or degree of negligence than gross negligence was valid: Illinois Cent. R. R. Co. v. Read, 37 Ill. 484; 87 Am. Dec. 260; Toledo etc. Ry. Co. v. Beggs, 85 Ill. 80; 28 Am. Rep. 613. But, in the present case, it cannot be said that the deceased intestate was riding upon a free pass. "A person who is traveling, with the

consent of the railroad company, upon a freight train in charge of stock or goods carried by the company for him, is a passenger: Indianapolis etc. Ry. Co. v. Beaver, 41 Ind. ²⁴ 493; Lawson v. Chicago etc. R. R. Co., 64 Wis. 447; 54 Am. Rep. 631. Even where such a person is traveling in charge of cattle on a drover's pass, he is a passenger for hire; the consideration for his passage is the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping the cattle: Railroad Co. v. Lockwood, 17 Wall. 357; Indianapolis etc. R. R. Co. v. Horst, 93 U. S. 291; Cleveland etc. R. R. Co. v. Curran, 19 Ohio St. 1; 2 Am. Rep. 362; 3 Am. & Eng. Ency. of Law, 16, and cases cited in notes; Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510;" New York etc. R. R. Co. v. Blumenthal, 160 Ill. 40. Inasmuch as the deceased was a passenger, the degree of care required of the appellant for his safety was "the highest reasonable and practicable skill, care, and diligence": Chicago etc. R. R. Co. v. Arnol, 144 Ill. 261, and cases there cited. In the case of Arnold v. Illinois Cent. R. R. Co., 83 Ill. 273, 25 Am. Rep. 383, it seems to have been held that a railroad company could make a contract with a passenger on a freight train to exempt itself from liability for any other negligence than gross negligence. That case proceeded upon the theory that there was a difference between the obligation of a railroad company to carry a passenger upon a freight train, and its obligation to carry a passenger upon a passenger train, in respect to the degree of care required to be exercised. In later cases, however, it has been held that a carrier will be held to the same strict accountability for the negligence of its servants, resulting in injury to a passenger who is lawfully and properly on a freight train, as governs its liability for such negligence where the transportation is upon a train devoted to passenger service exclusively: Chicago etc. R. R. Co. v. Arnol, 144 Ill. 261; New York etc. R. R. Co. v. Blumenthal, 160 Ill. 40. A railroad company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and cannot, even by contract, limit its liability for injuries to passengers to gross negligence alone. It ²⁵ is responsible for any degree of negligence which is sufficient to cause the injury, whether the negligence be called gross or ordinary. The requirement of such responsibility is demanded upon grounds of public policy.

It is contended by appellee that, under the law of Iowa, where the contract was made, it was void, and of no binding effect. Upon the trial of the case the plaintiff below introduced in evidence section 1308 of the Iowa code, which is as follows:

"Sec. 1308. No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into."

The plaintiff below also introduced in evidence the opinion of the supreme court of Iowa in the case of *McDaniel v. Chicago etc. Ry. Co.*, 24 Iowa, 412, holding that a contract, similar to that here under consideration, was made void by said section 1308, and could not be enforced in Iowa.

Whether or not the restriction of appellant's liability, as contained in this contract, was void or not by reason of said section 1308 depends upon the further question, whether it is to be construed according to the law of Iowa, or the law of Illinois if the law of Illinois were such as it is claimed to be by the appellant. The contract was executed in the state of Iowa. As a general rule, the law of the state, in which a contract for carrying is made, controls as to its nature, interpretation, and effect. In *Pennsylvania Co. v. Fairchild*, 69 Ill. 260, 263, we said: "The rule upon that subject is well settled, and has often been recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the law of some other state": See, also, *Milwaukee etc. Ry. Co. v. Smith*, 74 Ill. 197. We discover nothing in this contract to indicate that, in entering into it, the parties had in view the law of any other state than that of Iowa. In *Michigan Cent. R. R. Co. v. Boyd*, 91 Ill. 268, 271, where the goods were shipped from Massachusetts to Lincoln, Illinois, and the contract of shipment was made in Massachusetts, we said: "The contract for the carriage of the goods having been made in Massachusetts, the law of that state must control as to its nature, interpretation, and effect." It is contended by counsel for appellant that this contract should be interpreted in accordance with the law of the place where it is to be performed. This action is brought in Illinois, and the injury resulting in Beebe's death occurred in Illinois. There is nothing in the terms of the contract itself to indicate that the parties intended any performance thereof in the state of Illinois. If there was any intention that the contract should be performed in any other state than Iowa, the performance must have been contemplated as taking place in the state of Indiana rather than in the state of Illinois, because the property carried was to be taken to Indiana. The perform-

ance of the contract was to be consummated in the latter state. If, however, the contract be regarded as one, which was to be partly performed in Iowa and partly in Illinois, it yet must be said of it, that it is a contract which is entire and indivisible. "If a contract be entire and indivisible, and is to be partly performed in the state where it is made, and partly in another, then the *lex loci contractus*, or the law of the state where it is made, governs as to its validity, and, if invalid there, it is invalid everywhere else": Rorer on Interstate Law, 69; *McDaniel v. Chicago etc. Ry. Co.*, 24 Iowa, 412; *Western etc. R. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522. Inasmuch, therefore, as the contract, under the construction contended for by appellant, was partly to be performed in Iowa, it must, as to its validity, nature, obligation, and interpretation, be ²⁷ governed by the law of Iowa. This being so, it was void under section 1308, and the instructions complained of were not erroneous.

The objections, made by appellant to the third and eighth instructions given for appellee, are disposed of by what has already been said. As to the objections to the eleventh, twelfth, and thirteenth instructions given for the plaintiff below, it is sufficient to say that appellant asked similar instructions in its own behalf which were given; and, therefore, it is estopped from complaining: *Illinois Cent. R. R. Co. v. Latimer*, 128 Ill. 163; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614.

3. The appellant further complains that counsel for plaintiff below was guilty of making improper remarks to the jury. The counsel was severe in his comments upon the character of some of appellant's witnesses. These comments, however, were called forth and justified by the remarks previously made in his address to the jury by one of the counsel for appellant. Aside from this, however, when the remark complained of was made by the counsel for the plaintiff below in his closing address to the jury, counsel for appellant objected to the same, and the court sustained the objection. Counsel for appellant are estopped from here complaining of a ruling made by the court below, which was in their favor. After the court made a remark, which amounted in substance to a sustaining of the objection so made, counsel for the appellant did not ask the court for any further ruling upon the subject. They were content with the action of the court, so far as it went. They did not request the court to rule out the objectionable remark, and, therefore, it cannot now be said that there was a refusal to rule it out. In arguing cases to the jury, attorneys must be allowed to make

reasonable comments upon the evidence, and upon the bearing of the witnesses giving the evidence. The interests of public justice require that counsel should not be subjected to any unreasonable restrictions ²⁸ in this regard. We discover nothing erroneous in the action of the court below upon this subject.

The judgments of the appellate court and of the circuit court are affirmed.

Mr. Justice Boggs took no part in the decision of this case.

RAILROADS—DUTIES AS TO PASSENGERS—PERSON RIGHTFULLY ON FREIGHT TRAIN.—In carrying passengers, railroads are held to the highest degree of care, diligence, and skill consistent with such mode or means of transportation under the circumstances: *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477; 59 Am. St. Rep. 910; *Gardner v. Waycross etc. R. R. Co.*, 97 Ga. 482; 54 Am. St. Rep. 435, and note. The risks assumed by a passenger on a freight train are no greater than those assumed by a passenger on a regular passenger train, so far as the condition of cross-ties, or the condition of the road for the safety of trains moving upon it is involved: *Ohio etc. Ry. Co. v. Watson*, 93 Ky. 654; 40 Am. St. Rep. 211, and note.

RAILROADS—DROVER'S PASS—STIPULATION AGAINST LIABILITY FOR NEGLIGENCE.—A person traveling on a railroad train upon a "drover's pass" or "stock pass" for the purpose of taking care of his stock on the train, is a passenger for hire. The railroad company, therefore, owes him the same duties of care that it owes to any other passenger upon a freight train; and if he is injured on the trip through the negligence of the carrier, he may recover therefor, notwithstanding a stipulation that the carrier shall be exempt, because the law will not allow the carrier to stipulate against its own negligence even on a freight train: See monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 89.

CONTRACTS—VALIDITY—CONFLICT OF LAWS.—The validity, as well as the construction and effect, of a contract, will be determined by the *lex loci*, unless it is to be performed in another state: See monographic notes to *Ford v. Buckeye State Ins. Co.*, 99 Am. Dec. 668, and *McGarry v. Nicklin*, 55 Am. St. Rep. 44-55.

APPEAL—ERROR NOT GROUND FOR REVERSAL.—Parties cannot complain of error which they invite or adopt: *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615; *Borden v. Croak*, 131 Ill. 68; 19 Am. St. Rep. 23; *Estate of Radovich*, 74 Cal. 536; 5 Am. St. Rep. 466.

STINSON v. CONNECTICUT MUTUAL LIFE INSURANCE CO.

[174 ILLINOIS, 125.]

A MORTGAGEE CANNOT ACQUIRE TITLE TO THE MORTGAGED PREMISES by purchasing them at a tax sale. If he does make such purchase, either in his own name or that of another, the mortgagor has the right to treat it as a payment and to compel the canceling of the certificate of sale on refunding the money paid, with interest.

MORTGAGE—REDEMPTION FROM TAX SALE BY THE MORTGAGEE.—If a mortgagee has procured an assignment of a tax certificate, and has presented such certificate with a claim to recover the amount paid therefor with interest, the mortgagor cannot affect a redemption through the county clerk's office, and thus cut off the mortgagee's right to interest.

MORTGAGE—ENCUMBRANCE ON INFINITESIMAL PART OF THE PROPERTY—MORTGAGEE'S RIGHT TO REMOVE.—If a mortgagor covenants in his mortgage to pay all taxes, assessments, and other charges on the property, and to remove all adverse claims, clouds, and encumbrances thereon, and a sale for taxes is subsequently made of the east vigintillionth of the property, the mortgagee has the right to have the cloud created by the sale removed, and hence may redeem from it and charge the amount necessarily expended in so doing to the mortgagor, and enforce repayment out of the mortgaged premises.

Suit to foreclose a mortgage made to secure a loan of fifteen thousand dollars with interest thereon, payable semiannually. This interest had been promptly paid. The mortgage required the mortgagor to pay all taxes, assessments, and other charges upon the premises, to remove all adverse claims, clouds, and encumbrances thereon, and to at once repay all advances made for insurance, taxes, assessments, rates, redemption from tax sales or assessments, or to otherwise protect the security given with interest thereon. The mortgagor, in 1893, failed to pay one assessment for five hundred and seventy-two dollars and eighty-five cents, and another for six hundred and eighty-six dollars and eighty-one cents, and the property was sold for the payment of such assessments on November 4th and 14th of the same year. It was bid in by William Mills, who, on the ninth of December following, transferred the certificates to the mortgagee. The mortgagor was notified of these sales and was requested to redeem therefrom, but he failed to do this, and this suit was thereupon commenced. During its pendency, the mortgaged premises were again offered for sale for another special assessment, and the east vigintillionth was sold to William Mills for six hundred and three dollars and thirty-three cents, and the certificate by him indorsed to the mortgagee. Before it was so indorsed, however, the mortgagor notified the mortgagee not to

bid in or redeem this certificate. On November 16, 1894, the mortgagor, Stinson, redeemed from the sales made in 1893, by depositing the amount thereof with the county clerk. At the hearing in the trial court, it was held that the sales of November 4th and 14th had been properly redeemed by the mortgagor, and hence that the complainant could not recover on account thereof, but was entitled only to the redemption money left with the county clerk. It was further held that the sale of the east vigintillionth was not a cloud on the title to the mortgaged premises. A decree was entered for the mortgage debt, entirely disregarding the claims made for moneys expended by the complainant in acquiring the certificates of sale made under the assessments already stated. The complainant appealed to the appellate court, which reversed the judgment of the trial court and remanded the cause with directions to allow the amount expended on the three sales, and the defendant mortgagor thereupon appealed to this court.

Enoch J. Price and H. S. Mecartner, for the appellant.

E. Parmalee Prentice, for the appellees.

¹²⁸ CRAIG, J. The first question presented for determination is, whether the appellate court erred in holding that the complainant in the bill was entitled to a decree for the amount paid for the tax certificates issued on the tax sales of November 4 and 14, 1893, with interest thereon at the rate of eight per cent. It appears from the evidence that Mills, who purchased at the tax sales, was a clerk in the office of one Hamilton; that before the sale complainant made an arrangement with Hamilton to purchase at the tax sales all properties upon which complainant held mortgages, and, after the sale the tax certificates were to be transferred to complainant upon the payment of the amount bid and twenty-five per cent. Under this arrangement Mills made the purchases as directed by Hamilton, and after the sales were made complainant paid Hamilton the amount of the respective bids and twenty-five per cent, and received the tax certificates indorsed in blank by Mills. It is not claimed in the argument that if the insurance company, after the sale, had gone to the office of the county clerk and redeemed from the sale by the payment of the amount required by law, which would have been the same amount paid Mills, it would not be entitled to recover, under the mortgage, the amount thus paid. Nor is it denied that if complainant, after it acquired the tax certifi-

cates, had taken them to the county clerk and had them canceled, it might recover the amount paid for the certificates. The cost in either case would have been the same, and the mortgagee was at liberty to pursue either course which it might think best. It could make no difference to the mortgagor what course was pursued, unless the mortgagee attempted to purchase at the tax sale and set up a title to the premises under its purchase. If, therefore, the mortgagee did not, by the purchase of the tax certificates from Mills, obtain a title which it could in the end set up against the mortgagor, but was bound to ¹²⁹ hold the tax certificates for the benefit of the mortgagor as a redemption or a purchase, to be canceled, it would seem plain, under the provision of the mortgage requiring the mortgagor to repay advances for taxes, assessments, redemption from tax sales or assessments, the mortgagee was entitled to a decree for the amount advanced for the certificates of sale, and interest thereon.

We think the law is well settled that a mortgagee in possession is not entitled to obtain a tax title on the mortgaged premises and set it up to defeat the right of redemption in behalf of the mortgagor; but whether a mortgagee out of possession may lawfully acquire title through a tax sale, and thus cut off the equity of redemption of the mortgagor, is a question upon which the authorities are not harmonious. But we think the clear weight of authority establishes the rule that a mortgagee, whether in or out of possession, cannot acquire and set up a tax title in the mortgaged premises against the mortgagor. In *Maxfield v. Willey*, 46 Mich. 255, it is said: "When the mortgagee, instead of making payment of the taxes, makes a purchase of the land at tax sale, either in his name or the name of another person who has his money for the purpose, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid, with interest. . . . Neither party to a mortgage can be suffered, against the will of the other, to buy at a tax sale and thereby cut off the other's interest." In *Woodbury v. Swan*, 59 N. H. 22, in the discussion of the question, the court said: "Mortgagor and mortgagee have a unity of legal interest in the protection of their title against a sale for nonpayment of taxes, and against outstanding tax titles, and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles. Therefore, the mortgage contract comprises an implied agreement that while either party may buy a tax title ¹³⁰ for the preservation of his

right in the mortgaged property, neither of them will buy a tax title for the extinguishment of the title, in the maintenance of which they, as well as partners and tenants in common, are in law jointly concerned." See, also, the following cases, where the same principle is substantially announced: *Martin v. Swofford*, 59 Miss. 328; *Fair v. Brown*, 40 Iowa, 210; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Fisk v. Brunnette*, 30 Wis. 102. In *Ragor v. Lomax*, 22 Ill. App. 628, the question is thoroughly discussed and the authorities cited, and the conclusion reached that a mortgagee cannot, whether in or out of possession of the mortgaged premises, acquire a tax title and set it up against the mortgagor.

It was primarily the duty of the mortgagor to pay the taxes on the mortgaged property, but when he failed to do so and the property was sold for the taxes, the duty then devolved upon the mortgagee to relieve the property from the burden, and, under the provision of the mortgage, charge the amount, with interest, to the mortgage indebtedness. This was done by the mortgagee. It had no right to buy in the land for the purpose of acquiring and holding a tax title as against the mortgagor, and it never attempted to do so, as shown by what was done after it obtained the certificates of tax sale. Indeed, when the form of the transaction is disregarded and the substance alone considered, it is manifest that the purchase of the certificates by the mortgagee amounted to a redemption, and nothing more. The amount paid only equaled the amount required to redeem, and the fact that the money was paid to Mills instead of the county clerk, when the rights of the mortgagor and mortgagee are only involved, is unimportant.

It will be observed that the sale of the mortgaged premises on October 24, 1894, was within less than a year from the date of the sales in 1893, and it is insisted that the mortgagor, under section 211 of the revenue law, had the right to redeem from the sales of November 4 and 14, 1893, by depositing with the county clerk the amount bid at said sales, respectively, without penalties, and, having done so, the court erred in including the sums paid for the certificates of sale of 1893. This redemption by the mortgagor was not made until the twenty-sixth day of November, 1894. Before this, however, on the hearing before the master in chancery, the two tax certificates were produced by the mortgagee and filed as evidence under which the mortgagee claimed to recover the amount paid out by it, and interest thereon, under the provision of the mortgage. After

the mortgagor was thus notified that the mortgagee had in fact redeemed from these sales and produced the tax certificates, and filed them with the master for the purpose of recovering from the mortgagor the amounts advanced as a redemption, it was then too late for the mortgagor to avail of the right of redemption provided by the statute. Although the record in the office of the county clerk did not show a cancellation of the certificates of sale, they had, in fact, been canceled as certificates of sale, and the mortgagor knew that fact, and, knowing the fact, could not avail of the statute which authorizes a redemption in ordinary cases. We are therefore of the opinion that the court properly allowed and included in the decree the amount paid for the tax certificates issued on the sales of November 4 and 14, 1893, and interest thereon.

The next question presented is, whether the court erred in allowing complainant the amount paid, and interest, for the tax certificate issued on the sale of October 24, 1894, for the east vigintillionth of the mortgaged premises. Mills purchased at this sale under the same arrangement that was made when he purchased at the sales of November 4 and 14, 1893, and after the sale the certificate was indorsed in blank and transferred to complainant upon the payment of the amount of the bid and twenty-five per cent. It is claimed that the sale of the east vigintillionth of the mortgaged premises did not ¹³² create such a claim, cloud, or encumbrance as, under the terms of the mortgage, the mortgagee might remove without the consent of the mortgagor. As has been seen, the mortgagor covenanted to pay all taxes, assessments, rates, and other charges upon the mortgaged premises, and remove all adverse claims, clouds, and encumbrances. It may be true that if this tax sale had not been removed, but allowed to ripen into a tax title, the holder might not be able to maintain ejectment, or, if judgment for possession was rendered, there might be difficulty in obtaining possession under a writ, on account of the diminutive quantity of the land sold; but while that may all be true, the sale for the unpaid assessment was nevertheless an encumbrance, which the mortgagee had the right, under the terms of the mortgage, to have removed. The question here involved is not what title would be acquired by a purchase under a sale of the east vigintillionth, but, as between mortgagor and mortgagee under the covenant of the mortgage, was the sale an encumbrance which the appellee had the right to insist should be removed. In *Robey v. Chicago*, 48 Ill. 130, where a person at a tax sale purchased only the millionth

part of a lot, it was held that he had an interest which he was entitled to protect, and in order to protect that interest he was entitled to have it, on his application, separately assessed. So here, although the fraction sold was a minute one, the sale relieved the mortgaged premises of the burden except as to the minute fraction sold, and the purchaser acquired an interest which the mortgagee might properly insist should be removed in order that the premises should be free from all encumbrances, as provided in the covenant in the mortgage.

If we are correct in the view thus taken, it will not be necessary to consider the question of tender, raised and discussed in the argument of counsel, as there was not a sufficient amount tendered, at any stage of the proceedings, to cover the mortgage indebtedness and the several ¹³³ amounts paid out, and interest, so as to relieve the mortgaged premises from the several special assessments upon which the property was sold.

The judgment of the appellate court will be affirmed.

MORTGAGE—PURCHASE BY MORTGAGEE AT TAX SALE.—It is a general rule that a mortgagee cannot purchase and assert a tax title against his mortgagor to defeat the latter's equity of redemption: *Note to Safe Deposit etc. Co. v. Wickhem*, 62 Am. St. Rep. 877, 878. A mortgagee who, to protect his security, redeems the mortgaged land from a sale for taxes, has a right on foreclosure to charge the land with the amount so paid, in addition to the amount due on the mortgage: *Red Mountain Min. Co. v. Jefferson Co. Sav. Bank*, 113 Ala. 629; 59 Am. St. Rep. 151, and note; *Abbott v. Stone*, 172 Ill. 634; 64 Am. St. Rep. 60; monographic note to *Blake v. Howe*, 15 Am. Dec. 687, 688.

LADD v. JUDSON.

[174 ILLINOIS, 314.]

CREDITORS' SUITS.—A JUDGMENT AT LAW IN THE STATE WHEREIN A CREDITOR'S SUIT IS BROUGHT is usually essential to its maintenance.

CREDITORS' SUITS TO REACH EQUITABLE ASSETS.—A JUDGMENT AT LAW establishing complainant's demand is an indispensable prerequisite to the maintenance of a creditors' suit, though the fund to be reached is accessible only by the aid of a court of chancery. The only exception to this rule is when the demand is of such an equitable character that a judgment at law cannot be obtained thereon.

CREDITORS' SUITS AGAINST NONRESIDENTS.—The fact that a person against whom it is sought to maintain a creditors' suit is a nonresident of, and absent from, the state will not enable the complainant to sustain such suit without first procuring a judgment at law within this state upon his alleged demand. Notwithstanding such absence, a suit by attachment could be sustained

whereby the interest of the defendant in any property within the state, subject to attachment, could be reached and a lien thus created against it.

Suit in equity based upon a judgment recovered in the state of Oregon against the defendants, Thomas P. and Jennie H. Judson. The bill alleged that the father of Jennie H. Judson, dying intestate, left a large amount of property in Illinois, which he had devised and bequeathed to his executor in trust to sell and convert into money and to divide the proceeds among his children, that there remained in the hands of such executor, undisposed of, certain real property, described in the bill, that the judgment debtors were insolvent and were nonresidents of the state of Illinois, and that there was no other property in that state owned by the defendants which could be reached by attachment or otherwise. The bill was demurred to by the executor, who was a party defendant, upon the ground that it did not appear therefrom that the complainants had recovered a judgment at law on their claims. The demurrer was sustained, the bill dismissed, and the complainants appealed.

Howett & Jett, for the appellants.

James M. Truitt, for the appellees.

349 WILKIN, J. The principal question raised and discussed on this record is, whether the failure of complainants below to obtain a judgment at law against the defendants Judson in this state is, on the facts alleged, fatal to their bill. That a judgment at law and execution thereon, with a return of nulla bona, are prerequisites to the maintenance of a creditor's bill proper has never been questioned. Our statutes expressly so provides. A bill in the nature of a creditor's bill, the object of which is to remove a fraudulent encumbrance or other obstruction out of the way of a levy and sale under an execution, may be filed immediately upon obtaining judgment. The judgment is, however, no less essential in such a case than that of a simple creditor's bill. The reason frequently given for requiring such judgment at law in both classes of cases is, that to allow a complainant to establish his claim in the first instance in a court of chancery would be to deprive the defendant of the right of trial by jury. It is also well settled that the judgment at law necessary to give the court jurisdiction in such cases must be a judgment in the jurisdiction where the bill is filed: Winslow v. Leland, 128 Ill. 304; citing Steere v. Hoagland, 39 Ill. 264.

But counsel for appellants insist that there is a third class of cases in which a creditor may maintain a bill in equity for the satisfaction of his debt—that is, where he seeks to reach property or funds accessible only by the aid of a court of chancery—and that in such cases no judgment at law is necessary. Expressions are referred to in some early decisions of this court which give support to this contention: *Greenway v. Thomas*, 14 Ill. 271; *Miller v. Davidson*, 3 Gilm. 518; 44 Am. Dec. 715; *Getzler v. Saroni*, 18 Ill. 511. But it has never been decided in this state that the mere ²⁵⁰ fact that assets of a debtor out of which satisfaction is sought can only be reached through a court of equity will give that court jurisdiction in the absence of a judgment at law, and the uniform holding that in bills of the second class above mentioned such a judgment must be averred and proved is irreconcilable with any such decision. If a case can arise in which relief may be sought in equity in the first instance, it must appear that the complainant's demand is of such an equitable character that it can only be established in a court of chancery, otherwise the right of the defendant to a trial by jury upon a legal claim would be taken away, and the reason for the rule, as above stated, destroyed. And so we said in *Dormneil v. Ward*, 108 Ill. 216, 219, where it was insisted that the case came within an exception to the general rule requiring a judgment: "These so-called exceptions, when properly understood, are rather nominal than real, for a bill of this character will not lie in any case where the claim, as it is here, is a purely legal demand. In all cases where such a bill has been maintained, the claim of the complainant has had some equitable element in it—such as a trust, or the like. But, in the absence of some element of this character, there is a want of jurisdiction to adjudicate upon the claim at all, and it is upon this fundamental doctrine the rule controlling this class of cases rests. When, however, a judgment has been obtained and an execution has been returned nulla bona, and it can be shown the defendant has equitable assets which cannot be reached by execution, or that he, or others acting in concert with him, have fraudulently placed obstructions in the way of collecting the claim by execution, a case will then be made out for the interposition of a court of equity. The jurisdiction of the court thus invoked is known as a part of the auxiliary jurisdiction of a court of equity; but as a condition precedent to its exercise, where the demand is purely legal, as it is here, the claim must be reduced to a judgment and an execution thereon ²⁵¹ returned nulla bona. Such is the set-

tled law of this state, and it is supported by the general current of authority": See, also, *Shufeldt v. Boehm*, 96 Ill. 560.

If it were true, as alleged in the bill and urged in the argument, that by reason of the nonresidence of the defendants Thomas P. and Jennie H. Judson an action at law cannot be maintained against them in this state, that fact would furnish no sufficient reason for changing the well-settled rule, uniformly adopted, making a judgment at law necessary: *Shufeldt v. Boehm*, 96 Ill. 560. We are not, however, prepared to hold that this bill shows that such a judgment cannot be obtained. If Mrs. Judson's ownership in the property in question, or the proceeds thereof when sold, is such an interest as can be seized by a decree in chancery and applied in satisfaction of her indebtedness, it is difficult to see why, under our attachment and garnishment laws, an action at law cannot be maintained against her. Cases like *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600, *West v. Schnebly*, 54 Ill. 523, and *Farrar v. Payne*, 73 Ill. 82, decided under the law as it existed prior to the passage of the act of March 31, 1869, re-enacted December 23, 1871, and still in force, are not authorities on this question. The present statute authorizes the levy of a writ of attachment upon any lands or tenements in and to which a debtor "has or may claim any equitable interest or title": Rev. Stats., c. 11, sec. 8, p. 154. It would seem clear that Mrs. Judson, on the facts here alleged, "has or may claim" some equitable interest in the property in the hands of the executor of her father's will. But if she cannot, upon what principle can her creditors attack it? If it be conceded that the property could not be levied upon, still the executor, if he has in his "possession or power" any property, effects, choses in action, or credits belonging to Mrs. Judson, may be summoned as garnishee in an action by attachment: Rev. Stats., c. 11, sec. 21.

In *Steib v. Whitehead*, 111 Ill. 247, certain real estate was devised to trustees to keep rented, make repairs, ²⁵² et cetera, and "pay over all remaining rents and income in cash into the hands of my said daughter Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet," and it was held that the net income was not liable to garnishment in the hands of the trustee for debts of the beneficiary, Juliet. The decision was placed upon the sole ground that by the terms of the devise it appeared the testator intended to place it beyond the control of his daughter or her creditors while in the hands of the trustees. It is fairly inferable, from

what is there said, that but for such manifest intention on the part of the testator the fund would have been the subject of garnishment.

But it will not be necessary to pursue this inquiry further. It may be that, upon a full answer in garnishment, involving all the facts and a construction of the will of Solomon Harkey, such an action cannot be maintained, but on the facts here alleged, which are admitted by the demurrer, we see no reason for so holding. Aside from that question, appellants' claim being purely a legal one, they cannot reach Mrs. Judson's property through a court of equity without first obtaining a judgment against her in a court where she may avail herself of a jury trial and all legal defenses which she may have to such claim, and if it be true that no such judgment can be obtained, then, however great the hardship, they must forego the satisfaction of their debt out of the property sought to be reached by this bill.

The judgment of the appellate court will be affirmed.

MR. JUSTICE PHILLIPS dissented. He insisted: 1. That the property sought to be reached was not subject to levy and sale under execution, nor to garnishment; 2. That no judgment at law could be recovered against the nonresident beneficiaries whose interests were sought to be reached by the suit; and 3. That, as the complainant could not recover such judgment at law, he was entitled to maintain this suit without first prosecuting any action at law within the state: *Russell v. Clark*, 7 Cranch, 87; *Steere v. Hoagland*, 39 Ill. 264; *Scott v. McMillen*, 1 Litt. 302; 13 Am. Dec. 239; *Anderson v. Bradford*, 5 J. J. Marsh. 69; *Kipper v. Glancey*, 2 Blackf. 356; *Pendleton v. Perkins*, 49 Mo. 565; *Peay v. Morrison*, 10 Gratt. 149; *Earle v. Grove*, 92 Mich. 285; *Pope v. Solomons*, 36 Ga. 541; *McCartney v. Bostwick*, 32 N. Y. 62.

Of the Demands Which will Support a Creditor's Bill.*

Exhausting Legal Remedy.—*Creditors' Bills Originated* in the ineffectiveness of legal executions, and were designed to aid creditors who, having exhausted their legal remedies, still remain with their debts unsatisfied, to reach property of their debtors not reachable by ordinary legal processes of execution. The theory upon which equity jurisdiction has developed is, that it should afford a remedy for every wrong, reparation for which is not to be gained in courts of law, and the necessary result of this is, that equity will not interfere in a case wherein the parties have an adequate legal remedy which has not been exhausted. It is an elementary rule that, to enable

*REFERENCE TO MONOGRAPHIC NOTES.

Choses in action, how far subject to creditors' suits: 14 Am. Dec. 542, 543.
 Creditor's bill on judgment of United States court: 23 Am. Dec. 790, 792.
 Creditors' bills: 90 Am. Dec. 288-501.
 Equitable jurisdiction to compel payment of stock subscriptions: 3 Am. St. Rep. 810-812.

one to file a creditor's bill, he must have exhausted all legal remedies which might afford him the redress which he seeks: See monographic note to *Massey v. Gorton*, 90 Am. Dec. 288; *Board of Public Works v. Columbia College*, 17 Wall. 521; *National Tube Works v. Ballou*, 146 U. S. 517; *Cates v. Allen*, 149 U. S. 451; *Merchants' Nat. Bank v. Sabin*, 34 Fed. Rep. 492, where it is said: "A court of equity will give relief in favor of the judgment creditor only when the remedy at law is inadequate and not effectual to reach the property by execution, or when there is some obstruction to the enforcement of the legal remedy": *Mississippi Mills v. Cohn*, 39 Fed. Rep. 865; *Streight v. Junk*, 59 Fed. Rep. 321; *Scott v. Ware*, 64 Ala. 174; *Ledyard v. Johnston*, 16 Ala. 548; *Henderson v. McVay*, 32 Ala. 471; *Baines v. Babcock*, 95 Cal. 581; 29 Am. St. Rep. 158; *Bulkeley v. Welch*, 81 Conn. 339; *Robinson v. Springfield Co.*, 21 Fla. 203; *McGough v. Insurance Bank*, 2 Ga. 151; 46 Am. Dec. 382; *Thurmond v. Reese*, 3 Ga. 449; 46 Am. Dec. 440; *Pease v. Scranton*, 11 Ga. 33; *Billing v. Rutherford*, 29 Ga. 38; *Lawson v. Grubbs*, 44 Ga. 466; *Chittenden v. Rogers*, 42 Ill. 95; *Scheubert v. Honel*, 152 Ill. 313; *Dormuell v. Ward*, 108 Ill. 216; *Stirlen v. Jewett*, 165 Ill. 410; *Guyton v. Flack*, 7 Md. 398; *Mill River etc. Assn. v. Clafin*, 9 Allen, 101; *Ames v. Sheehan*, 161 Mass. 274; *Tyler v. Peatt*, 30 Mich. 63; *Wadsworth v. Schisselbauer*, 32 Minn. 84; *Moffatt v. Tuttle*, 35 Minn. 301; *Coleman v. Rives*, 24 Miss. 634; *Weaver v. Cressman*, 21 Neb. 675; *Haston v. Castner*, 29 N. J. Eq. 536; *McCartney v. Bostwick*, 32 N. Y. 53; *Beardsley Scythe Co. v. Foster*, 86 N. Y. 560; *Cramer v. Blood*, 48 N. Y. 684; *Smitherman v. Allen*, 6 Jones Eq. 17; *Bridges v. Moya*, Busb. Eq. 170; *Artman v. Giles*, 155 Pa. St. 409; *Austin v. Morris*, 23 S. C. 393; *Galveston etc. R. R. Co. v. McDonald*, 53 Tex. 510; *Enright v. Grant*, 5 Utah, 334; *German Bank v. Leyser*, 50 Wis. 258; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54.

In the application of the rule just stated it must often be determined under peculiar facts whether or not the complainant has sufficiently exhausted his legal remedies to become entitled to the aid of equity's extraordinary ones. Courts do not agree as to the extent to which such exhaustion must be carried. As will be shown later herein, some courts require a judgment creditor to prove the issue of execution and a return thereon of "no property found," but even those courts differ as to what circumstances will justify an exception to their established rule. Other courts dispense with the execution and the return thereon. To each rule laid down there are many recognized exceptions, and, aside from the questions arising in the determination of the rules and the exceptions thereto, we find a number of collateral matters which have received considerable attention, as of the sufficiency of judgments as a basis for creditor's suits, and of the essentials of executions and returns thereon. These matters will be noticed later. It has been said that "it is not for the court to anticipate that the common-law remedy will not prove effectual—it must be pushed to every available extent": *McGough v. Insurance Bank*, 2 Ga. 151; 46 Am. Dec. 382; and that an execution must issue even though it must prove futile: *Lichtenberg v. Herdtfelder*, 33 Hun, 57. But this rigid rule has been relaxed in

some states: *Heyneman v. Dannenberg*, 6 Cal. 376; 65 Am. Dec. 519; *Blair v. Illinois Steel Co.*, 159 Ill. 350; *Riggin v. Hilliard*, 56 Ark. 476; 35 Am. St. Rep. 113. The tendency of the decisions and of legislation has been to dispense with tedious and useless technicalities in the application of the rule requiring an exhaustion of legal remedies as a prerequisite to the filing of a creditor's bill, and to relax the rule where, by reason of the death, insolvency, or nonresidence of the debtor, or because of the purely equitable nature of the claim sought to be enforced, or the property sought to be reached, legal process would be ineffective and its issuing useless.

Remedy at Law, When Remains and Bars Creditor's Bill.—To exclude a court of equity from jurisdiction of a creditor's bill there must be a remedy at law as practicable and efficient as the remedy afforded by equity: *Gullickson v. Madsen*, 87 Wis. 19. Where a creditor has a plain, adequate, and complete remedy by attachment or garnishment which he has not exhausted, he has no standing to file a creditor's bill: *Mill River Loan etc. Assn. v. Clafin*, 9 Allen, 101; *Stephens v. Whitehead*, 75 Ga. 294. In his petition he must show that he has no such remedy remaining: *White Sewing-Machine Co. v. Atkeson*, 75 Tex. 330; *Weaver v. Cressman*, 21 Neb. 675. But when the remedy by garnishment, owing to the peculiar circumstances of the case, is not so full and complete as the remedy in equity, a creditor will be allowed the benefit of the latter without having availed himself of the former: *Mann v. Appel*, 31 Fed. Rep. 378; *Phillips v. Wesson*, 16 Ga. 137. The existence of the statutory remedy of garnishment does not, it is held, oust a court of equity from jurisdiction of a creditor's suit to set aside a conveyance by a debtor in fraud of his creditors: *Vicksburg etc. R. R. Co. v. Phillips*, 64 Miss. 108. If, when an execution was returned unsatisfied, there was, within the knowledge of the creditor, property of the debtor subject to levy on execution, the legal remedy is not exhausted until such property is reached: *Merchants' Nat. Bank v. Sabin*, 34 Fed. Rep. 492; *Howard v. Sheldon*, 11 Paige, 558. Where a creditor has partially proceeded at law to enforce his claim, equity will not interfere unless he has been ousted of the benefit of his legal remedy: *McGough v. Insurance Bank*, 2 Ga. 151; 46 Am. Dec. 382; though plaintiff may be permitted to elect which suit he will proceed with, and to prosecute the suit in equity if he elects to discontinue the action at law: *Sandford v. Wright*, 164 Mass. 85. Nor will equity interpose where a party having failed to exhaust his remedy against the executors of his deceased debtor endeavors to proceed by creditor's bill against the heirs or devisees: *Wambaugh v. Gates*, 11 Paige, 505; similarly where he has failed to exhaust a remedy afforded him against the estate in the orphan's court: *MacGill v. Hyatt*, 80 Md. 253; *Aldrich v. Annin*, 54 Mich. 230. A creditor of an estate whose claim against it has not been allowed may bring an action in equity to annul an order setting apart a homestead to the widow of the deceased, which he alleges to have been in fraud of his rights, without appealing from the order or moving to vacate it, the latter proceedings being both inadequate remedies: *Wickersham v. Comerford*, 96 Cal. 433. Although a deceased debtor was

one of two joint and several guarantors, his creditor may proceed against the debtor's estate in equity without first exhausting his remedy against the surviving guarantor: *Carter v. Hampton*, 77 Va. 681. A fraudulent and invalid decree of a state probate court is no bar to a creditor's bill in a federal court to set aside a sale thereunder: *Johnson v. Waters*, 111 U. S. 640; nor is such a bill barred by the pendency of a suit at law in which the issue raised in the equity suit cannot properly be presented: *Rothschild v. Hasbrouck*, 65 Fed. Rep. 283. The objection that the complainant in a creditor's bill has an adequate remedy at law must be made in limine, and if not so made, a court of equity is not ousted of jurisdiction: *Ross-Meehan Brake Shoe etc. Co. v. Southern Malleable Iron Co.*, 72 Fed. Rep. 957; *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371. In the latter case, Justice Brewer, delivering the opinion of the court, said: "Defenses existing in equity suits may be waived, just as they may be in law actions, and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal."

Legal Remedy Need Not Always be Exhausted.—Although a creditor has not exhausted his legal remedy, he may have a standing to file a creditor's bill if he is in the position of a creditor with a lien: *Pharis v. Leachman*, 20 Ala. 662. A statute authorizing the filing of a creditor's bill by one having neither a lien nor judgment is constitutional: *Cook v. New York etc. Milk Co.*, 100 Ala. 580; *Cook v. Schmidt*, 100 Ala. 582; but, in general, equity will assist only those creditors who have exhausted their legal remedies, or who have liens enforceable only in equity; and it is essential that their liens be legal or equitable: *Holt v. Bancroft*, 30 Ala. 193; *Stephens v. Beal*, 4 Ga. 319; *Tyler v. Peatt*, 30 Mich. 63; *Hargrove v. Baskin*, 50 Miss. 194; *Crippen v. Hudson*, 13 N. Y. 161; *Tappen v. Evans*, 11 N. H. 811; *England v. Russell*, 71 Fed. Rep. 818; *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371; and this rule is in no way changed by the fact that the United States is party plaintiff: *United States v. Ingate*, 48 Fed. Rep. 251. Equity is the proper forum in which a creditor may reach equitable interests or assets not subject to legal execution or lien: *Spindle v. Shreve*, 111 U. S. 542; *Dargan v. Waring*, 11 Ala. 988; 46 Am. Dec. 234; *Beam v. Bennett*, 51 Mich. 148; *Snodgrass v. Andrews*, 30 Miss. 472; 64 Am. Dec. 169; *Heath v. Bishop*, 4 Rich. Eq. 46; 55 Am. Dec. 654. Where a creditor's bill is aimed at such interests, the rule requiring a precedent exhaustion of legal remedies is relaxed. Later herein we consider the effect of the nonresidence, death, or insolvency of the debtor, or of a conveyance by him in fraud of his creditors as justifying a modification of the rule requiring judgment, and execution thereon, or judgment, execution, and return thereof unsatisfied, as a condition precedent to a resort to equity. Exceptions are made, under similar circumstances, to the rule under consideration. Thus, if one

joint debtor be out of the state, his creditor may proceed in chancery to subject the absentee's choses in action to the payment of his debt, without exhausting his remedy against a resident joint debtor: *Curd v. Letcher*, 3 J. J. Marsh. 443. Similarly, creditors of an insolvent estate may resort to a court of equity in the first instance without exhausting legal remedies which are inadequate on account of such insolvency: *Bowling v. Amls*, 58 Ga. 400; *Hamilton v. Mississippi College*, 52 Miss. 65; and creditors of an insolvent corporation may, by a creditor's bill, reach unpaid stock subscriptions without first exhausting all of the legal remedies afforded by statute: *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133; 28 Am. St. Rep. 405. The most important exception to the rule arises in cases where creditors desire to reach property which the debtor has conveyed in fraud of them. In such cases, a creditor may come into equity for relief though he has not exhausted his legal remedy: *Watts v. Gayle*, 20 Ala. 817; *Chardavoyne v. Galbraith*, 81 Ala. 521; *Dickinson v. National Bank*, 98 Ala. 546; *Wooten v. Steele*, 109 Ala. 563; 55 Am. St. Rep. 947; *Thurmond v. Reese*, 3 Ga. 449; 46 Am. Dec. 440; *Wisconsin Granite Co. v. Gerrity*, 144 Ill. 77; *Brown v. Kimball*, 84 Me. 492; *Anderson v. Newman*, 60 Miss. 532; *Central Nat. Bank v. Doran*, 109 Mo. 40; *Sheafe v. Sheafe*, 40 N. H. 516; *Robert v. Hodges*, 16 N. J. Eq. 299; *Chautauqua County Bank v. White*, 6 N. Y. 236; 57 Am. Dec. 442; *Shaw v. Dwight*, 27 N. Y. 244; 84 Am. Dec. 275, where the object of the suit was to cancel prior judgments which were apparent liens on the debtor's lands, but which had been paid; *Multnomah Street Ry. Co. v. Harris*, 13 Or. 198, where it is said that, while equity will not interfere in a suit to reach equitable assets belonging to judgment debtors until the ordinary means allowed by law to enforce the collection of the debts have been enforced, "this is not the rule where the debtor has interposed an inequitable obstacle to the collection of the debt. When the debtor has clouded the title to real property by an encumbrance or fraudulent transfer of it, the judgment creditor may proceed at once to have it removed. . . . The suit in that case is to aid his remedy at law, and he is not required even to issue an execution." Equity will not interfere, however, where the conveyance complained is a mere nullity, as in that case there is no obstruction to the enforcement of a judgment: *Bessman v. Cronan*, 65 Ga. 559. The reasons for allowing a creditor to come into equity to set aside a fraudulent conveyance before he has exhausted his legal remedy are apparent. It avoids needless sacrifice: *Central Nat. Bank v. Doran*, 109 Mo. 40. Such a conveyance embarrasses his legal remedy: *Shaw v. Dwight*, 27 N. Y. 244; 84 Am. Dec. 275. "The right to disembarrass the title before the property is sold to satisfy the judgment is valuable to the creditor; if he were compelled to sell it under execution, encumbered with a conveyance or lien, supposed to be fraudulent, comparatively few would be inclined to purchase, and they at a depreciated price. This consideration, apart from all others, is a potent argument in favor of the jurisdiction of equity": *Planter's etc. Bank v. Walker*, 7 Ala. 926; *Thurmond v. Reese*, 3 Ga. 449; 46 Am. Dec. 440.

Recovery of Judgment a Prerequisite to Filing of Creditor's Bill—With certain exceptions which will be noted herein, and unless the rule has been modified by statute, it is a general rule that a creditor cannot resort to equity for aid in the collection of his debt until he has established his claim by recovering judgment thereon: *Adler v. Fenton*, 24 How. 407; *Smith v. Railroad Co.*, 99 U. S. 398; *Cates v. Allen*, 149 U. S. 451; *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371; *Dahlman v. Jacobs*, 15 Fed. Rep. 863; *Atlanta etc. R. R. Co. v. Western Ry. Co.*, 50 Fed. Rep. 790; *Putney v. Whitmire*, 66 Fed. Rep. 385; *England v. Russell*, 71 Fed. Rep. 818; *Turner v. Morrow*, 28 Ala. 339; *Smith v. Moore*, 35 Ala. 76; *Scott v. Ware*, 64 Ala. 174; *Neuman v. Dreifurst*, 9 Colo. 228; *Richardson v. Gilbert*, 21 Fla. 544; *Cubbege v. Adams*, 42 Ga. 124; *Peyton v. Lamar*, 42 Ga. 121; *Stephens v. Whitehead*, 75 Ga. 294; *Greenway v. Thomas*, 14 Ill. 271; *Austin v. Bruner*, 169 Ill. 178; *Ladd v. Judson*, 174 Ill. 344; ante, p. 267; *West v. McCarty*, 4 Blackf. 244; *Ware v. Delahaye*, 95 Iowa, 667; *Nash v. Burchard*, 87 Mich. 85; *Skeele v. Stanwood*, 33 Me. 309; *Gorton v. Massey*, 12 Minn. 145; 90 Am. Dec. 287; *Mizzel v. Herbert*, 12 Smedes & M. 550; *Crowell v. Horacek*, 12 Neb. 622; *Oakley v. Pound*, 14 N. J. Eq. 178; *Mittnacht v. Smith*, 2 C. E. Green, 259; 88 Am. Dec. 233; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Rambaut v. Mayfield*, 1 Hawks, 85; *Ginn v. Brown*, 14 R. I. 524; *Allen v. Arnold*, 18 R. I. 809; *State v. Foot*, 27 S. C. 340; *Williams v. Tipton*, 5 Humph. 66; 42 Am. Dec. 420; *McKeldin v. Gouldy*, 91 Tenn. 677; *Rhodes v. Cousins*, 6 Rand. 188; 18 Am. Dec. 715; *Spindle v. Fletcher*, 93 Va. 186. The reasons for this requirement are that a court of equity has no jurisdiction to determine as to the existence of a debt: *Hahn v. Salmon*, 20 Fed. Rep. 801. Legal claims should be first adjudicated in courts of law, the tribunals in which such claims are properly cognizable, and legal remedies should be first exhausted: *Ginn v. Brown*, 14 R. I. 524. Until a creditor has established his title he has no right to interfere with his debtor by calling in the aid of equity: *Wiggins v. Armstrong*, 2 Johns. Ch. 144; for until his debt is entered of record it constitutes no lien upon his debtor's property: *Haston v. Castner*, 31 N. J. Eq. 697; *Moore v. Ragland*, 74 N. C. 343. Although there are statutes in the states where federal courts are sitting, which dispense with judgment as a prerequisite to the filing of a creditor's bill, the general rule laid down above will be adhered to: *Scott v. Neely*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451.

Execution and Return of, Nulla Bona—Necessity of.—From the general rule stated in the paragraph immediately preceding there is little dissent, for the bare recovery of judgment in a court of law is the least requirement a court of equity will insist upon before giving its aid to a debtor in the collection of his debt. In applying the rule requiring such debtor to exhaust his legal remedies before coming into equity—unless the application is made in a case coming within the exceptions noted later herein or the rule is changed by statute—courts of equity will require that he shall not only have recovered judgment upon his claim, but also that execution shall have issued thereon and been returned unsatisfied: *Jones v. Green*,

1 Wall. 330; **Case v. Beauregard**, 99 U. S. 119; **Taylor v. Bowker**, 111 U. S. 110; **National Tube Works v. Ballou**, 146 U. S. 517; **Brown v. Farwell Co.**, 74 Fed. Rep. 764; **Morgan v. Crabb**, 3 Port. 470; **Neubert v. Massman**, 37 Fla. 91; **McDowell v. Cochran**, 11 Ill. 31; **Moshier v. Meek**, 80 Ill. 79; **Heacock v. Durand**, 42 Ill. 230; **Anderson v. Bradford**, 5 J. J. Marsh. 69; **Dana v. Banks**, 6 J. J. Marsh. 219; **Proctor v. Bell**, 97 Ky. 98; **Griffin v. Nitcher**, 57 Me. 270; **Parish v. Lewis**, 1 Freem. Ch. 299; **Steward v. Stevens**, Harr. (Mich.) 169; **First Nat. Bank v. Dwight**, 83 Mich. 189; **Grenell v. Ferry**, 110 Mich. 262; **Trego v. Skinner**, 42 Md. 426; **Morgan v. Bogue**, 7 Neb. 429; **Albright v. Texas etc. R. R. Co.**, 8 N. Mex. 422; **Frothingham v. Hadenpye**, 135 N. Y. 630; **McElwain v. Willis**, 9 Wend. 549; **Beck v. Burdett**, 1 Paige, 305; 19 Am. Dec. 436; **Grimsley v. Hooker**, 3 Jones' Eq. 4; 67 Am. Dec. 227; **Screven v. Bostick**, 2 McCord Eq. 410; 16 Am. Dec. 664; **Putnam v. Bentley**, 8 Baxt. 84; **Montague v. Horton**, 12 Wis. 668 (599*); **Pierce v. Milwaukee Construction Co.**, 38 Wis. 253; **Hughes v. Hunner**, 91 Wis. 116; **Gilbert v. Stockman**, 81 Wis. 602; 29 Am. St. Rep. 922; **Krouskop v. Krouskop**, 95 Wis. 296; **Bassett v. St. Albans Hotel Co.**, 47 Vt. 313. The fact that a judgment creditor was prevented from having execution issued upon his judgment by certain military orders issued under the reconstruction acts was held not to excuse his failure to have a return of "no property found" so as to enable him to file a creditor's bill: **Mixon v. Dunklin**, 48 Ala. 455. Justice Field thus states the reasons for requiring execution and return thereof as a condition precedent to the filing of a creditor's bill: "A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some encumbrance upon the debtor's property, or some fraudulent transfer of it. . . . The execution shows that the remedy afforded at law has been pursued, and, of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not": **Jones v. Green**, 1 Wall. 330. See, also, **McDowell v. Cochran**, 11 Ill. 31; **Ishmael v. Parker**, 13 Ill. 324.

Sufficiency of Particular Judgments to Satisfy Rule.—A judgment recovered by a debtor upon his claim cannot be impeached collaterally, and cannot be questioned upon a creditor's bill: **Mattingly v. Nye**, 8 Wall. 370; **Quinn v. People**, 146 Ill. 275. The court is not authorized to decide upon the regularity of the judgment: **Newman v. Wilets**, 60 Ill. 519. But if a court has proceeded without jurisdiction its judgment is absolutely void for every purpose, and will be so declared in any court in which it may be presented: **Fitzpatrick v. Rutter**, 160 Ill. 282. Judgment without service of process upon, or appearance of the party against whom it is rendered, is a mere nullity, and cannot be made the basis of any equitable remedy: **Tyler v. Peatt**, 30 Mich. 63. A creditor's bill cannot be based upon a void judgment: **Johnson v. Parrotte**, 46 Neb. 51; **Anderson v. Hawhe**, 115 Ill. 83. An undocketed justice's judgment is insufficient: **Crippin v. Hudson**, 18 N. Y. 161; **Dix v. Briggs**, 9 Paige, 595. The recovery of judgment must precede the filing of a creditor's

bill: *Brown v. Bank of Mississippi*, 31 Miss. 454; *Brinckerhoff v. Brown*, 4 Johns. Ch. 671; and the recovery of a judgment afterward cannot be set up by a supplemental bill so as to confer upon the court jurisdiction which it did not have when the bill was filed: *Morrison v. Shuster*, 1 Mackey, 190. See *Williams v. Brown*, 4 Johns. Ch. 682; *Edgar v. Clevenger*, 3 N. J. Eq. 258. A satisfied judgment is insufficient to support a creditor's bill: *Bickerdike v. Allen*, 157 Ill. 95; *Rogers v. Welte*, 61 Mich. 258; *Frost v. Reynolds*, 4 Ired. Eq. 494; *Johnson v. Parrotte*, 46 Neb. 51. A judgment barred by the statute of limitations will not support a creditor's bill: *Davidson v. Burke*, 143 Ill. 139; 36 Am. St. Rep. 367; *Lakeman v. Robards*, 9 Mo. App. 179; *Edwards v. McGee*, 31 Miss. 143; *Hall v. Green*, 60 Miss. 47; *Fleming v. Grafton*, 54 Miss. 79; though the relief sought is from a fraudulent conveyance, because such a judgment would be unenforceable if the conveyance complained of had not been made: *Fox v. Wallace*, 31 Miss. 660; *Edwards v. McGee*, 31 Miss. 143; *Fleming v. Grafton*, 54 Miss. 79; *Hall v. Green*, 60 Miss. 47; *Davidson v. Burke*, 143 Ill. 139; 36 Am. St. Rep. 367. If, however, owing to a debtor's failure to plead the statute in bar, a creditor recovers judgment on a barred claim, the latter may pursue, by a creditor's bill, assets of the former transferred after the claim was barred: *McManomy v. Chicago etc. R. R. Co.*, 167 Ill. 497. It is a good defense to a creditor's bill based upon a judgment, that since the filing of the bill, the judgment has been set aside by the court which rendered it: *Butchers' etc. Bank v. Willis*, 1 Edw. Ch. 645; or that a writ of error is pending to reverse the judgment: *Smith v. Crocheron*, 2 Edw. Ch. 501; although the latter defense loses its force if for a period of four years no transcript is sent up and the appeal is not prosecuted: *Warder v. Rivers*, 64 Iowa, 412.

Sufficiency of Foreign Judgments—Federal and State Judgments.—In *Clafin v. McDermott*, 12 Fed. Rep. 375, it was endeavored to make a California judgment the basis of a creditor's bill in the federal circuit court sitting in New York, the object of which bill was the setting aside of certain transfers of personal property made in California by the judgment debtors, to McDermott. In refusing to entertain the bill, the court, per Wallace, J., said: "Obviously, the complainants are mere creditors at large of the defendants in the California judgment. The judgment of another state has no force in this save what it derives from the laws of this state and the provision of the constitution of the United States which relates to its effect as evidence. It ranks here as a simple contract debt. . . . Except as a binding adjudication between the parties upon the subject matter of the suit, the judgment of one of our sister states has no operation here upon the rights or remedies of the parties to it. It cannot be a foundation for a creditor's bill here any more than a judgment recovered in England or in Canada. It must be sued over here before it becomes a judgment for the purposes of any remedy here, at law or in equity."

"This conclusion is reached with less reluctance in view of the practical objections which would exist if foreign judgment creditors were permitted to resort to this jurisdiction to remove obsta-

cles in the way of their legal remedies. These obstacles always exist in the jurisdiction where the judgment is obtained. Frequently their removal involves the consideration of the force and effect of remedies and rights created by local law, which are more properly adjudicated in local tribunals." For similar holdings see *McLure v. Benceni*, 2 Ired. Eq. 513; 40 Am. Dec. 437; *Patterson v. Lynde*, 112 Ill. 196; *Ladd v. Judson*, 174 Ill. 344; ante, p. 267; *Dick v. Truly*, 1 Smedes & M. Ch. 557. The same rule has been observed where the object of the bill was to reach realty situated within the state where remedy is sought: *Davis v. Dean*, 26 N. J. Eq. 436; *Crim v. Walker*, 79 Mo. 335. While the rule may be considered as supported by the best reason and authority, there are cases which do not recognize it, or which raise exceptions to it: *Ward v. McKenzie*, 83 Tex. 297; 7 Am. Rep. 261; *Taylor v. Branscombe*, 74 Iowa, 534; *Merchants' & Miners' etc. Co. v. Borland*, 53 N. J. Eq. 282; *Robert v. Hodges*, 16 N. J. Eq. 299; *Earle v. Grove*, 92 Mich. 285; *Rule v. Omega Stove etc. Co.*, 64 Minn. 326; *Schickle v. Watts*, 94 Mo. 410.

A creditor's bill in a United States circuit court may be based upon a judgment recovered in a state court in the same judicial district: *Gorrell v. Dickson*, 26 Fed. Rep. 454; *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. Rep. 6; notwithstanding the existence of statutory legal remedies in the state courts. The equity jurisdiction of the court cannot be taken away or diminished by state legislation: *First Nat. Bank v. Steinway*, 77 Fed. Rep. 661. In *Bacon v. Harris*, 62 Fed. Rep. 99, the reasons for allowing such effect to judgments of state courts rendered within the same judicial district are stated at length by Shiras, D. J., later of the United States supreme court, and the conclusion reached that "if a party has obtained judgment in a state court, and issued execution, without being able to enforce payment thereof, he is entitled, upon return of the execution unsatisfied, to invoke the aid of a court of equity, either state or federal, sitting in the same state, of otherwise competent jurisdiction, for the enforcement of his rights; and therefore if the citizenship of the parties is diverse, and the amount involved is sufficient, he may file a bill in a court of the United States for the purpose of attacking conveyances of property which prevent the levy of an execution in the law action." See, also, *Clafin v. McDermott*, 12 Fed. Rep. 375. In *Merchants' Nat. Bank v. Chattanooga Construction Co.*, 53 Fed. Rep. 314, it was held that a creditor's bill may be maintained in a federal court upon a judgment procured in a different state from that in which the court sits. In that case, the court, without discussing the matter further than to acknowledge that "many state courts and some federal courts have held that jurisdiction does not follow such judgments," based its conclusion solely upon the holding of *Stutz v. Handley*, 41 Fed. Rep. 531, affirmed in *Handley v. Stutz*, 139 U. S. 417. In the opinion in the supreme court in the latter case the matter of the sufficiency of the judgments which were obtained in Kentucky was not noticed, and in the circuit court, which sat in Tennessee, it was dismissed as immaterial upon the ground that since the object of the bill was

"to reach and subject a trust fund, complainants were not even required to have reduced their claim to judgments, and exhausted their remedy at law after the insolvency of the company."

A federal judgment may, by the weight of authority, be made the basis of a creditor's suit in a court of the state within which the court rendering it sits: *Brown v. Bates*, 10 Ala. 432; *Bullett v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412; *First Nat. Bank v. Sloman*, 42 Neb. 350; 47 Am. St. Rep. 707; *Vanderveer v. Stryker*, 8 N. J. Eq. 185; *Ballin v. Loeb*, 78 Wis. 404. Such judgments are treated as domestic judgments of a superior court of the state in which rendered. Says the court in *Vanderveer v. Stryker*, 8 N. J. Eq. 185: "A judgment in the district court of the United States for New Jersey is as satisfactory evidence of the existence of a debt as the judgment of our own supreme court; and an execution issued from the district court has the same power and territorial extent as an execution from our own supreme court; and if an execution from that court fails to yield the plaintiff his judgment debt, it is as entire a failure as if his execution had issued from our supreme court." This reasoning, however, is opposed by some cases holding that judgments of a federal court are placed upon no higher ground in the courts of the state wherein rendered than judgments rendered in any sister state or territory: *Tarbell v. Griggs*, 3 Paige, 207; 23 Am. Dec. 790, and note. They are regarded as adjudications of courts of another jurisdiction which will not be recognized in the courts of the state wherein rendered as the basis upon which to act and afford relief: *Steere v. Hoagland*, 39 Ill. 264; *Winslow v. Leland*, 128 Ill. 338. There is little authority for regarding such judgments as foreign under such circumstances. On the contrary it is generally held that a federal judgment is to be regarded as a domestic judgment in the courts of the state in which the court rendering it sits: *Turrell v. Warren*, 25 Minn. 9; *Thomson v. County of Lee*, 22 Iowa, 206; *Barney v. Patterson*, 6 Har. & J. 182; *Wandling v. Straw*, 25 W. Va. 692. Under the Mississippi statute requiring the enrollment of judgments in order to create a lien, federal judgments have no liens within the state except in the counties where they have been rendered or enrolled: *Hall v. Green*, 60 Miss. 47.

Sufficiency of Execution and Return—Execution.—Before a creditor's bill will lie to aid a creditor in the collection of his judgment debt execution must at least have been attempted: *Jones v. Green*, 1 Wall. 330; *Stirlen v. Jewett*, 165 Ill. 410. As to the place to which execution must have issued before a return thereof unsatisfied will afford a basis for a creditor's bill, there appears to be no rule which can be generally applied. Statutory differences, the situation of the judgment debtor's property, and his residence, any or all, may affect the rule. Where a judgment debtor has a fixed and known place of residence at the time the execution is issued, and has visible property in the county where he resides sufficient to satisfy the debt, it will be a good answer to the complainant's bill that he has neglected to issue an execution to that county: *Child v. Brace*, 4 Paige, 309; *Smith v. Fitch*, 1 Clarke Ch. 265; *Strange v. Longley*, 3 Barb. Ch. 650; *Bay State Iron Co. v. Goodall*, 89 N. H. 223; 75 Am.

Dec. 219; unless the plaintiff show some legal excuse for such failure: *Merchants' etc. Bank v. Griffith*, 10 Paige, 519; *Allis v. Newman*, 33 Neb. 597. See, also, *Freeman v. State Bank*, Walk. Ch. 62. It has been held that, to make such defense available, the defendant should show that he not only resided, or had a place of business, in some other county than that to which the execution issued, but also that he had visible property there, out of which the execution might have been satisfied, if the complainant had exercised due diligence to ascertain the fact: *Brown v. Bates*, 10 Ala. 432; and where the defense is that the judgment debtor had lands in other counties upon which levy might have been made, the value of the property should be stated. "The defendant might have had lands in a dozen different counties, the whole of which would not be more than sufficient to pay the debt. This court would not, in such a case, require a plaintiff, before filing a bill, to take out a dozen successive executions, which would take six years, allowing a term for each execution": *Albany City Bank v. Dorr*, Walk. Ch. 318. In Tennessee, it is enough if the creditor shows an exhaustion of his legal remedy by a return unsatisfied in the county in which the judgment was recovered: *Riddle v. Motley*, 1 Lea, 468; also *Embree v. Reeve*, 8 Humph. 37. An execution issued and returned three years or more before the filing of a creditor's bill will not sustain it, there being no new execution issued in the meantime, nor satisfactory reasons given why such issue was not made: *Storms v. Ruggles*, 1 Clarke Ch. 148. An execution issued a few hours after the judgment debtor's death, without notice to his representatives, or permission of the surrogate court, will not sustain a creditor's bill in New York: *Prentiss v. Bowden*, 145 N. Y. 342. Where execution has issued and been returned unsatisfied, a creditor's bill may be maintained thereon notwithstanding the issue of an alias execution, unless it appears that the sheriff has levied, or at least can levy, upon sufficient property, under the execution in his hands, to satisfy the whole of the complainant's debt: *Thomas v. McEwan*, 11 Paige, 131; *Cuyler v. Moreland*, 6 Paige, 273; *Storm v. Badger*, 8 Paige, 130. But where executions have issued to two counties, a creditor's bill cannot be sustained except there be a return of both unsatisfied. A return of one is insufficient unless by proper showing the return of the other is dispensed with: *Willis v. Moore*, 1 Clarke Ch. 150.

The Return shows whether the legal remedy has proved effectual or not, "and from the embarrassments which would attend any other rule, the return is held conclusive": *Jones v. Green*, 1 Wall. 830. "There would be no end to litigation in this class of cases," says the chancellor in *Albany City Bank v. Dorr*, Walk. Ch. 318, "if this court would go behind the officer's return. It might with as much propriety go behind the judgment itself, and allow what has been adjudged at law to be litigated anew here, as to inquire into the regularity of the proceedings at law." *Merchants' Nat. Bank v. Sabin*, 34 Fed. Rep. 492; *Stoors v. Kelsey*, 2 Paige, 418; *Congden v. Lee*, 3 Edw. Ch. 304. The return shows, *prima facie*, that the creditor has exhausted his legal remedy, and chancery has jurisdiction: *Bowen v. Parkhurst*, 24 Ill. 257; *Huntington v. Metzger*, 158 Ill. 272;

Daskam v. Neff, 79 Wis. 161. While an execution cannot be attacked for mere irregularity on a creditor's bill, it will be declared insufficient when absolutely void on its face: **Prentiss v. Bowden**, 145 N. Y. 342. The judgment creditor is entitled to rely upon the truth of the officer's return, and acquires a lien by his suit although the officer's return be false: **Clements v. Waters**, 90 Ky. 98. He need only show that an execution was issued and placed in the hands of an officer, who, after having made a demand upon the debtor, who stated that he had neither property nor money to satisfy the execution, returned it nulla bona: **Lewis v. Lanphere**, 79 Ill. 187; **Howe v. Whitney**, 66 Me. 17; **Bigelow Blue Stone Co. v. Magee**, 27 N. J. Eq. 392. The return must show, as a reason for its being unsatisfied, that the officer could find no property whereon to make a levy: **Buckeye Engine Co. v. Donau Brewing Co.**, 47 Fed. Rep. 6; but a return that he could find no property is sufficient. It need not be averred that he searched for property: **Suydam v. Beals**, 4 McLean, 12. In New York an execution to support a creditor's bill must be returned to the court whence it issued. A return to the clerk's office in another county where the judgment has been docketed is insufficient: **Winslow v. Pitkin**, 1 Barb. Ch. 402. A return of nulla bona by an officer other than the one to whom the execution is directed, is insufficient, even though it might have been directed to the officer who made the return: **Johnson v. Elkins**, 90 Ky. 168.

Time of Return.—The return of an execution on the return day is a sufficient basis for a creditor's bill: **Williams v. Hubbard**, 1 Mich. 446. There are cases holding that a premature return of an execution, a return before the return day named therein, will not support a creditor's bill filed before the return day: **Steward v. Stevens**, Harr. (Mich.) 169; **Thayer v. Swift**, Harr. (Mich.) 430; **First Nat. Bank v. Dwight**, 83 Mich. 189; **Cassidy v. Meacham**, 3 Paige, 312; or a bill filed after the return day: **Thayer v. Swift**, Harr. (Mich.) 430; **Stafford v. Hulbert**, Harr. (Mich.) 435; contra, **Suydam v. Beals**, 4 McLean, 12; though an exception is made where the object of the bill is to have certain conveyances set aside as fraudulent: **Beach v. White**, Walk. Ch. 496. When an execution is returned unsatisfied before the return day, it may be that the judgment debtor would have sufficient property to satisfy the execution at some time intermediate between the time of the return and the return day fixed by the execution. For this reason the foregoing cases consider that a return before such day is not such an exhaustion of legal remedies as is prerequisite to the filing of a creditor's bill. Compare **Adams v. Cumiskey**, 4 Cush. 420, and **Dillon v. Rash**, 27 Mo. 243, where it is held that an execution is not properly returnable before its return day. The better reason, and an unquestioned preponderance of authority sustain a different doctrine. While the naming of a return day fixes a time after which a levy cannot be made, and while in general it may be the duty of the officer to whom the writ is delivered to hold it until the return day, "he may take the responsibility of making an earlier return to it of nulla bona, especially after he has made a personal demand upon the defendant to turn out prop-

erty and he has refused to do so. When the return is made that the execution is unsatisfied in whole or in part, and that the defendant has no property out of which it can be satisfied, a case has arisen for the interposition of a court of chancery. His return becomes a matter of record and is conclusive as between the parties to the judgment, and the officers only can be questioned for a false return": *Bowen v. Parkhurst*, 24 Ill. 258; *First Nat. Bank v. Gage*, 79 Ill. 207; *Dana v. Banks*, 6 J. J. Marsh. 219; *Platt v. Caldwell*, 9 Paige, 386; *Forbes v. Waller*, 25 N. Y. 430; *Renaud v. O'Brien*, 35 N. Y. 99; wherein *Cassidy v. Meacham*, 3 Paige, 311, cited above, is distinguished; *Esselman v. Wells*, 8 Humph. 482; *Findley v. Smith*, 42 W. Va. 299; *Newlon v. Wade*, 43 W. Va. 283. If there was no property subject to an execution while it remained in the sheriff's hands, there exists no presumption that the condition of the debtor would be changed before the return day. A creditor is not bound to desist from an effort to subject the equitable assets of his debtor in the hope or expectation that by some chance he may thereafter acquire legal assets: *Ward v. Whitfield*, 64 Miss. 754. A return of nulla bona, after the judgment debtor's death, of an execution which might have been levied during his life, is insufficient: *Howe v. Whitney*, 66 Me. 17.

Collusive and Fraudulent Returns.—While it is generally stated that a return valid on its face is conclusive and not subject to attack when made the basis of a creditor's bill, this does not preclude the defendant from showing that the return was collusively made by the sheriff, by the direction of the plaintiff or his attorney. The return of an execution by order of plaintiff's attorney, and not because no property was found, is not a sufficient basis for a creditor's bill: *Scheubert v. Honel*, 152 Ill. 313; *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. Rep. 6. See *Stirlen v. Jewett*, 165 Ill. 410; *Wharton v. Fitch*, Walk. 143; and although there be no direct proof of collusion, equity will refuse relief where it is shown that both the complainant and the sheriff knew of real estate of the defendant upon which levy might have been made, but that the sheriff returned the execution unsatisfied: *Congden v. Lee*, 3 Edw. Ch. 304. Relief will be likewise refused where, although the creditor knew that the debtor had a place of residence and business and considerable property subject to levy in one county, execution was issued to another county in which he had no reason to expect to find any property, and returned unsatisfied: *Northwestern Iron Co. v. Central Trust Co.*, 90 Wis. 570; *Merchants' Nat. Bank v. Sabin*, 34 Fed. Rep. 492. It has been held, on the contrary, however, that an execution creditor is not bound to point out to the officer property upon which to levy; that he has performed his legal duty when he places his execution in the hands of the sheriff whose duty it is to make the money, and that the negligence of the sheriff is no defense: *Albany City Bank v. Dorr*, Walk. Ch. 318. In that case the plaintiff's attorneys were notified by the defendant of certain lands owned by him, of which he would turn out a sufficient quantity to satisfy any execution that might be issued upon judgment recovered against him. Execution issued and was placed in the sheriff's hands who did not call

on the defendant nor was informed by the attorneys of the existence and location of the lands spoken of. A plea setting forth these matters was overruled as not forming a good defense. While it is settled that an officer alone is liable for his negligence, an execution creditor who adopts it and makes it his own, as in the case cited, might properly be held accountable therefor, and at any rate, can scarcely plead that he has exhausted his legal remedies when he has deliberately closed his eyes to one that was adequate. Where an officer having made a bona fide but unsuccessful attempt to levy an execution, is directed by plaintiff's attorney to return it unsatisfied, and does so, the return may not be attacked for collusion. To make such an attack successful the plaintiff must, by collusion with the officer, have procured a return of nulla bona without an attempt in good faith to find goods subject to levy: *Forbes v. Waller*, 25 N. Y. 430; *Huntington v. Metzger*, 158 Ill. 272.

Joint Debtors—Essentials of Return.—Where, upon a judgment against two joint debtors, execution is issued directing a levy upon the property of the two defendants, and after demand has been made of one only, return is made that the defendants have no property upon which to levy, without in terms negating the fact that either of them had any separate property, such return is a sufficient basis for the filing of a creditor's bill against the defendants jointly: *Austin v. Figueira*, 7 Paige, 56. "The legal meaning of the return in this case," says the chancellor, "is that neither of the defendants jointly nor the defendant Spinola separately have any property of which he could levy the amount of the debt. The execution is as broad as the command in the body of the execution, and is only restrained by the limitation of the indorsement on the execution, in conformity with the statute." To the same effect: *Winchester v. Crandall*, Clark Ch. 371; *Williams v. Hubbard*, 1 Mich. 446. There is a presumption that the sheriff performed his duty in seeking both for the joint and separate property of the defendants, and, hence, that by such a return he meant to say that they had no property either jointly or individually, whereof he could make the amount of the judgment: *Conant v. Sparks*, 3 Edw. Ch. 104.

Exhaustion of Legal Remedies Excused—Nonresidence, Insolvency or Death of Debtor.—We now come to consider the many cases in which a complete or technical exhaustion of legal remedies is not considered prerequisite to the filing of a creditor's bill. It seems to be settled by the weight of authority that if it is impossible to obtain a personal judgment against a debtor by reason of his nonresidence, or of the fact that he has absconded, there being no adequate remedy provided by statute whereby his property can be reached, a creditor's bill will lie in the first instance from the necessity of the case, if the debtor have property reachable thereby: *Pope v. Solomons*, 36 Ga. 541; *Taylor v. Branscombe*, 74 Iowa, 534; *Corn Exchange Bank v. Applegate*, 91 Iowa, 411; *Kipper v. Glancey*, 2 Blackf. 856; *Scott v. McMillen*, 1 Litt. 302; 13 Am. Dec. 239; *Anderson v. Bradford*, 5 J. J. Marsh, 69; *Earle v. Circuit Judge*, 92 Mich. 285; *Overmire v. Haworth*, 48 Minn. 372; 31 Am. St. Rep. 660; *Pendleton v. Perkins*, 49 Mo. 565; *Merchants' Nat. Bank v. Paine*, 13

R. I. 592; Peay v. Morrison, 10 Gratt. 140. The principal case states the rule in Illinois: Ladd v. Judson, 174 Ill. 344; ante, p. 267; Dewey v. Eckert, 62 Ill. 218; but its holding was based upon the fact that the debtor had an unexhausted and adequate legal remedy: Greenway v. Thomas, 14 Ill. 271. In Alabama, it is well settled that the equity of a creditor's bill cannot be maintained on the ground that the debtor resides in another state: Smith v. Moore, 35 Ala. 76; Saunders v. Watson, 14 Ala. 198; Reese v. Bradford, 13 Ala. 837. The insolvency of a judgment debtor, by the preponderance of authority, renders the issuance of execution and a return thereof unnecessary as a condition precedent to the filing of a creditor's bill: The Holladay Case, 27 Fed. Rep. 830; Thurmond v. Reese, 3 Ga. 440; 46 Am. Dec. 440; Miller v. Dayton, 47 Iowa, 312; Gordon v. Worthley, 48 Iowa, 429; Postelwait v. Howes, 3 Iowa, 365; O'Brien v. Stambach, 101 Iowa, 40; 63 Am. St. Rep. 368; Turner v. Adams, 46 Mo. 85; Brown v. Long, 1 Ired. Eq. 190; 36 Am. Dec. 43; Bomberger v. Turner, 13 Ohio St. 263; 82 Am. Dec. 438; Enright v. Grant, 5 Utah, 334; Whitehouse v. Point Defiance etc. R. R. Co., 9 Wash. 558. The reasoning of these cases is, that insolvency, which is the material matter to be proven, may be shown by competent evidence other than that afforded by an execution issued and returned unsatisfied. To hold otherwise would be to require a meaningless form: Case v. Beauregard, 101 U. S. 688. See Steere v. Hoagland, 39 Ill. 264. In New York, however, the courts refuse to relax to such an extent the rule requiring an exhaustion of legal remedies to precede a resort to equity. The best evidence of the judgment debtor's insolvency is that afforded by the issuance and return of an execution unsatisfied, and while such evidence is available none of a secondary nature will be considered: Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Adsit v. Butler, 87 N. Y. 585; McElwain v. Willis, 9 Wend. 548. As to whether or not the insolvency of a debtor will enable a creditor to file a creditor's bill before having reduced his claim to judgment, the cases are in almost hopeless conflict. It is believed that the affirmative of the proposition is the more strongly supported. The recovery of judgment against an insolvent can scarcely be considered useless, it is argued, since it establishes the creditor's claim, which cannot properly be done in equity: Austin v. Bruner, 169 Ill. 178; Clark v. Raymond, 84 Iowa, 251; Halbert v. Grant, 4 T. B. Mon. 580; Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 229, where the rule is recognized, but judgment dispensed with on another ground; Estes v. Wilcox, 67 N. Y. 264; Adey v. Bigler, 81 N. Y. 349; Ginn v. Brown, 14 R. I. 524; McKeldin v. Gouldy, 91 Tenn. 677. On the other hand, it is urged that a creditor should not be required to procure a judgment upon which execution must prove fruitless; that it may be otherwise satisfactorily proved to the court that the debtor has not sufficient property of which levy can be made by legal process, and that the creditor should not be prejudiced in the enforcement of his rights by useless delay: Austin v. Nichols, 23 S. C. 393; Alabama Iron etc. Co. v. McKeever, 112 Ala. 134; Kempton v. Hallowell, 24 Ga. 52; 71 Am. Dec. 112; Lawson v. Virgin, 21 Ga. 356; Albany etc. Iron Co. v.

Southern Agricultural Works, 76 Ga. 169; Earle v. Grove, 92 Mich. 285; Reeder v. Speake, 4 S. O. 293. See, also, Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. Rep. 7; Talley v. Curtain, 54 Fed. Rep. 43; Towns v. Smith, 115 Ind. 480. Without going at length into a discussion of the statutes of the different states regarding the administration and distribution of the estates of decedents, it may be stated that another well-recognized exception to the rule that a creditor must exhaust his remedies at law before filing a bill in equity, arises in cases where the debtor is deceased. "The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there he will not be turned back to a court of law to establish his claim." Per Bradley, J., in Kennedy v. Creswell, 101 U. S. 641; Merchants' Nat. Bank v. McGee, 108 Ala. 304; Barber v. Peay, 31 Ark. 392; Unknown Heirs v. Kimball, 4 Ind. 546; 58 Am. Dec. 638; Bay v. Cook, 31 Ill. 336; Tharp v. Feltz, 6 B. Mon. 6; O'Brien v. Coulter, 2 Blackf. 421; Grosvenor v. Austin, 6 Ohio, 108; 25 Am. Dec. 743; Gardner v. Gardner, 17 R. I. 751; Spencer v. Armstrong, 12 Heisk. 707; Allen v. McRae, 91 Wis. 226. See, also, Merchants' etc. Transp. Co. v. Borland, 53 N. J. Eq. 282; Birely v. Staley, 5 Gill & J. 432; 25 Am. Dec. 303. For a contrary doctrine see Lichtenberg v. Herdtfelder, 67 How. Pr. 196, holding that the fact that the debtor himself may be deceased forms no legal excuse for a failure to issue execution, which under the New York code may be against his personal representatives: Adsit v. Butler, 87 N. Y. 585; Estes v. Wilcox, 67 N. Y. 284. Creditors having general judgments against a debtor cannot issue execution thereon after the debtor's death, and, where the latter's estate is insolvent, no further proceedings at law are required to lay a foundation for equitable relief against the debtor's fraudulent grantee: Lyons v. Murray, 95 Mo. 23; 6 Am. St. Rep. 17.

Fraudulent Conveyances.—In our inquiry into this subject we find no proposition more firmly established than that, in the absence of controlling statutes, a creditor must obtain a judgment at law before he may file a bill in equity to set aside a fraudulent conveyance by his debtor: Cates v. Allen, 149 U. S. 451; Dahlman v. Jacobs, 15 Fed. Rep. 863; Putney v. Whitmire, 66 Fed. Rep. 385; England v. Russell, 71 Fed. Rep. 818; Watts v. Gayle, 20 Ala. 817; Meux v. Anthony, 11 Ark. 411; 52 Am. Dec. 274; Castle v. Bader, 23 Cal. 76; Neuman v. Dreifurst, 9 Colo. 228; Barrow v. Balley, 5 Fla. 9; Peyton v. Lamar, 42 Ga. 131; Gore v. Kramer, 117 Ill. 176; Unknown Heirs v. Kimball, 4 Ind. 546; 58 Am. Dec. 638; Clark v. Raymond, 84 Iowa, 251; Tennent v. Battey, 18 Kan. 324; Scott v. McMillen, 1 Litt. 302; 13 Am. Dec. 239; Skeelee v. Stanwood, 33 Me. 307; Uhl v. Dillon, 10 Md. 500; 69 Am. Dec. 172; Ferguson v. Bobo, 54 Miss. 121; Alnutt v. Leper, 48 Mo. 319; Davis v. Dean, 26 N. J. Eq. 436; Briggs v. Austin, 129 N. Y. 208; Smitherton v. Allen, 6 Jones Eq. 17; Williams v. Tipton, 5 Humph. 66; 42 Am. Dec. 420; Gilbert v. Stockman, 81 Wis. 602; 29 Am. St. Rep. 922. But this rule has been changed by statute in a number of states, authorizing creditors at large to bring such suits: Reynolds v. Welch, 47 Ala. 200; Dickinson v. Na-

tional Bank, 98 Ala. 546; Riggin v. Hillard, 56 Ark. 476; 35 Am. St. Rep. 113; Field v. Holzman, 93 Ind. 205; Balls v. Balls, 69 Md. 388; Frank v. Eltringham, 65 Miss. 281; Le Duc v. Brandt, 110 N. C. 289; Pelzer v. Hughes, 27 S. C. 408; Naller v. Young, 7 Lea, 735; Wallace v. Treagle, 27 Gratt. 479; Tuft v. Pickering, 28 W. Va. 330. These statutes, as well as the decisions in those states where no such statutes prevail, indicate the policy of courts of equity to relax the rule requiring an exhaustion of legal remedies before affording their extraordinary aid, where a creditor seeks to attack fraudulent conveyances of his debtor. It is considered that when a creditor has reduced his claim to judgment, he has sufficiently exhausted his legal remedy to become entitled to file a creditor's bill to set aside fraudulent conveyances which obstruct the satisfaction of his judgment. The issue of execution and return thereof are generally dispensed with in such cases: McCalmont v. Lawrence, 1 Blatchf. 232; Hagan v. Walker, 14 How. 28; Watts v. Gayle, 20 Ala. 817; Robinson v. Springfield Co., 21 Fla. 203; Logan v. Logan, 22 Fla. 561; 1 Am. St. Rep. 212; Stephens v. Beal, 4 Ga. 319; Miller v. Davidson, 3 Gilm. 518; 44 Am. Dec. 715; Newman v. Willets, 52 Ill. 98; Wisconsin Granite Co. v. Gerrity, 144 Ill. 77; Dillman v. Nadelhoffer, 162 Ill. 625; Brown v. Kimball Co., 84 Me. 492; Wadsworth v. Schisselbauer, 32 Minn. 84; Twell v. Twell, 6 Mont. 19; Payne v. Sheldon, 63 Barb. 169; Royal Wheel Co. v. Fielding, 61 How. Pr. 437; contra, Gilbert v. Stockman, 81 Wis. 602, 29 Am. St. Rep. 922, weakened by the able dissenting opinion of Winslow and Pinney, JJ. This rule may be affected by the character of the property sought to be reached, whether it be realty or personalty. The entry of judgment against realty will create a lien upon it sufficient to sustain a creditor's bill, while a lien upon personalty is created by the levy of execution upon it. The existence of a lien, legal or equitable, is a usual condition precedent to the maintenance of a creditor's bill. In the following cases this distinction between realty and personalty is recognized: Morgan v. Crabb, 3 Port. 470; West v. McCarty, 4 Blackf. 244; Parish v. Lewis, 1 Freem. Ch. 299, where the distinction is drawn between legal and equitable assets: Mittnight v. Smith, 2 C. E. Green, 259; 88 Am. Dec. 233; Dunham v. Cox, 10 N. J. Eq. 437; 64 Am. Dec. 437; Robert v. Hodges, 16 N. J. Eq. 299; Brinkerhoff v. Brown, 4 Johns. Ch. 676; Screven v. Bostick, 2 McCord Eq. 410; 16 Am. Dec. 664; Mutual Assur. Soc. v. Stanard, 4 Munf. 539; Rhodes v. Cousins, 6 Rand. 188; 18 Am. Dec. 715.

Property not Reachable by Execution—Equitable Interests.—When a creditor comes into equity to reach interests or assets of his debtor not subject to execution, as trust interests, distributive shares in the estates of decedents, choses in action, and the like, it is plain that he has sufficiently exhausted his legal remedies when he has obtained judgment. By so doing, he has established the validity and amount of his claim, which he could not properly do in a court of equity. It is generally held that a creditor's bill in such a case must be based upon a previous law judgment: Smith v. Railroad Co., 99 U. S. 398; Smith v. Moore, 35 Ala. 76; Robinson v. Springfield Co., 21 Fla. 203; Miller v. Davidson, 8 Ill. 518; 44 Am. Dec. 715:

Mitchell v. Jones, 2 Ind. 89; Thornton v. Marginal Freight Ry., 123 Mass. 32; Smith v. Thompson, Walk. Ch. 1; Mizell v. Herbert, 12 Smedes & M. 547; Thurber v. Blanck, 50 N. Y. 80; Clark v. Strong, 16 Ohio, 318; Ginn v. Brown, 14 R. I. 524. The necessity for judgment in such a case has, however, been dispensed with by statute in at least three states: Sweetzer v. Buchanan, 94 Ala. 574; Biggin v. Hillard, 56 Ark. 476; 35 Am. St. Rep. 113; Tucker v. McDonald, 105 Mass. 423. In Russell v. Clarke, 7 Cranch, 69, it is said by Marshall, C. J., that "if a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made, in the first instance, to that court which will not require that the claim should be first established in a court of law," but authorities are not wanting which hold that a creditor cannot claim the aid of equity to reach the equitable assets of his debtor until he can show a judgment, with execution, issued thereon and returned unsatisfied: Prewitt v. Land, 36 Miss. 495; Miller v. Davidson, 3 Gilm. 518; 44 Am. Dec. 715; Dormuell v. Ward, 108 Ill. 216; Williams v. Hubbard, Walk. Ch. 28; Parish v. Lewis, Freem. Ch. 299; McElwain v. Willis, 9 Wend. 548; Ginn v. Brown, 14 R. I. 524. Execution and return have been dispensed with where the object of the bill was to reach realty held in secret trust for the debtor: Brainard v. Van Kuran, 22 Iowa, 261, where the judgment debtor never had title to the premises: Fairbairn v. Middlemiss, 47 Mich. 372; Brisay v. Hogan, 53 Me. 554, and where the judgment debtor had a judgment lien upon equitable realty which he sought to reach: Montgomery v. McGee, 7 Humph. 234; McNairy v. Eastland, 10 Yerg. 309.

Attachment Lien as Basis for Creditor's Bill.—It is well settled that a creditor having sued out an attachment and recovered judgment, may come into equity to set aside fraudulent conveyances of the attached property, but as to whether or not such relief will be granted without the recovery of judgment the authorities are in conflict. On the mere matter of authorities a decision well fortified could be rendered either way: Tennent v. Battey, 18 Kan. 324. It is a question upon which much has been said, but we must content ourselves with a bare reference to the opposing decisions. Those which allow the aid of equity in such a case do so on the principle that the attaching creditor has a lien by statute, and is entitled to such aid as much as in any other case of legal right: Dawson v. Sims, 14 Or. 561; that the requisite lien is as well gained by the levy of an attachment as by execution: Conroy v. Woods, 13 Cal. 626; 73 Am. Dec. 605; Heyneman v. Dannenberg, 6 Cal. 376; 65 Am. Dec. 519; Little v. Ragan, 83 Ky. 321; Martz v. Pfeifer, 80 Ky. 600; Cogburn v. Pollock, 54 Miss. 639; Stone v. Anderson, 26 N. H. 506; Sheafe v. Sheafe, 40 N. H. 516; Curry v. Glass, 25 N. J. Eq. 108; Williams v. Michenor, 11 N. J. Eq. 520; Francis v. Lawrence, 48 N. J. Eq. 508; Cocks v. Varney, 45 N. J. Eq. 72; Falconer v. Freeman, 4 Sand. Ch. 565; Frost v. Mott, 34 N. Y. 253; Dawson v. Sims, 14 Or. 561; Bennett v. Minott, 28 Or. 339; Hahn v. Salmon, 20 Fed. Rep. 801; New York Commercial Co. v. Francis, 83 Fed. Rep. 769. Such relief has been accorded an attaching creditor before judgment

where the debtor was insolvent and further proceedings at law would have been futile: *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851; and likewise where the debtor was nonresident: *Peay v. Morrison*, 10 Gratt. 149; *Ward v. McKenzie*, 33 Tex. 297; 7 Am. Rep. 261; *Quarl v. Abbott*, 102 Ind. 233; 52 Am. Rep. 662; *Kimbrow v. Clark*, 17 Neb. 403. On the other hand, courts of equal respectability have refused to exercise any such jurisdiction before judgment. According to their decisions a creditor has no apparent right to interfere with, or question, his debtor's disposition of his property until he has completed his title at law by judgment and execution. The mere commencement of an attachment suit and a levy upon the debtor's property settles nothing as to the justice and extent of the creditor's claim and with the determination of such matters equity has nothing to do: *Almy v. Platt*, 16 Wis. 169. While it is admitted that the levy of an attachment creates a lien, it is considered "a lien of very uncertain tenure," subject to defeat by the dissolution of the attachment, on motion, or a judgment in favor of the defendants on the merits of the claim: *Tennent v. Battey*, 18 Kan. 324. Cases upholding this view are *Greenway v. Thomas*, 14 Ill. 271; *Bigelow v. Andress*, 31 Ill. 322; *Detroit etc. Rolling Mills v. Ledwidge*, 162 Ill. 305; *Clark v. Raymond*, 84 Iowa 251; on second appeal, 86 Iowa, 661; *Childs v. N. B. Carlstein Co.*, 76 Fed. Rep. 86, following the Michigan statutes; *Martin v. Michael*, 23 Mo. 50; 66 Am. Dec. 656; *Weinland v. Cochran*, 9 Neb. 480; *Thurber v. Blanck*, 50 N. Y. 80; *Bowe v. Arnold*, 31 Hun, 256; *Artman v. Giles*, 155 Pa. St. 409. Where, after the levy of an attachment, and before judgment, the debtor dies, the lien of the attachment is dissolved, and will not support a creditor's bill, even after judgment, to subject the deceased's lands to the satisfaction of the debt: *Phillipps v. Ash*, 63 Ala. 414.

Of the Essentials of the Debt Sought to be Collected.—A mature and subsisting debt is required to support a creditor's bill, a contingent or prospective debt being generally held insufficient: *Adler v. Fenton*, 24 How. 407; *Jones v. Massey*, 79 Ala. 370; *Willard v. Briggs*, 161 Mass. 58; *Browne v. Hershelm*, 71 Miss. 574; nor can relief be obtained for a debt not due, by joining it with one past due: *McGhee v. Importers' etc. Nat. Bank*, 93 Ala. 192. Compare *Shannon v. Fechheimer*, 76 Ga. 86; *Pitt v. Poole*, 91 Tenn. 70. But the contingent liability of sureties enables them to attack fraudulent conveyances by their principals, because they are considered creditors from the date of their contracts: *Bragg v. Patterson*, 85 Ala. 233; *Greene v. Starnes*, 1 Heisk. 582. Where a judgment creditor attacks a decree of separation between a husband and wife as rendered collusively to defraud him, he must show that he was a creditor when the decree was rendered: *Hanney v. Maxwell*, 24 La. Ann. 49. The relation of debtor and creditor arises between client and attorney when the services of the latter are contracted for, regardless of whether or not the amount of his compensation was then ascertained and agreed upon: *Smith v. Cook*, 10 App. D. C. 487. One who has a claim for damages for a tort is a creditor of the tortfeasor from the accrual of the right of action, and upon the recovery of judgment may file a creditor's bill to set aside inter-

vening fraudulent conveyances of his debtor: *Shean v. Shay*, 42 Ind. 375; 13 Am. Rep. 366; *Miller v. Cook* 124 Ind. 101; *Petree v. Brotherton*, 183 Ind. 692; *Carblener v. Montgomery*, 97 Iowa, 659; *Pierstoff v. Jorgea*, 86 Wis. 128.

MARTIN v. MARTIN.

[174 ILLINOIS, 371.]

NEGOTIABLE INSTRUMENTS.—THE POSSESSION OF AN UNINDORSED NOTE made payable to a third person is prima facie evidence of ownership in the holder. This evidence is not rebutted by proof that the consideration for such note was furnished by such third person and that it was originally his property.

EVIDENCE—DECLARATIONS IN FAVOR OF ONE'S SELF.—Where it is claimed that certain promissory notes were given by their owner to his niece in his last illness, and it is shown that they were in her possession before his death, her statements made then and immediately after his death that he gave them to her are admissible in her favor.

Henry W. Wolseley, for the plaintiffs in error.

Robert L. Tatham and Henry S. Wilcox, for the defendant in error.

Hopkins, Thatcher & Dolph, and N. J. Aldrich, for the interested legatees.

373 **BOGGS, J.** The parties hereto are executors and executrix of the last will and testament of Edward Martin, deceased. They filed a joint petition in the county court of Kendall county, in which they represented that the executrix, Serena M. Martin, had in her possession, as an individual, a note executed by the Catholic bishop of Chicago to the decedent for the sum of five thousand five hundred dollars, and also another note executed by the Catholic bishop of St. Joseph, Missouri, to the said decedent, for the sum of fifteen thousand dollars, and that she claimed the notes as her individual property, and that the executors of the deceased claimed the notes in question constituted a part of the assets of the estate. The prayer of the petition was, that the court should hear and determine the question as to the ownership of the notes. The court heard the controversy and decided it adversely **373** to the defendant in error. She appealed to the circuit court of Kendall county, and a hearing was had in that court with like result as in the county court. She prosecuted an appeal to the appellate court for the second district.

The cause was submitted in the appellate court, and an order or decree entered reversing the decree of the circuit court and remanding the cause, with directions to the circuit court to enter a decree or order declaring the notes in controversy to be the property of the defendant in error, Serena M. Martin. This is a writ of error brought to reverse the judgment of the appellate court.

On the hearing in the circuit court the executors, Beers and O'Connor, voluntarily, and properly, as we think, assumed the position of petitioners or complainants, and the defendant in error the position of defendant.

The petition averred that the notes in question were in the possession of the defendant in error under the claim they were her private property. The law will not require one in the possession of a chattel or security, negotiable or otherwise, under claim of ownership, to deliver the same over upon the mere adverse claim of another, but will only disturb such possession upon proof of the right of such adverse claimant—that is to say, the presumption of the law is that one so in possession is *prima facie* entitled to remain in possession until the contrary is made to appear by proof. Any other rule would require every citizen to yield to the mere assertion of another. It therefore became incumbent upon the petitioning executors, in order to obtain favorable action upon the part of the court, to introduce such proof as would warrant an order that the defendant in error should deliver up possession of said notes. This they essayed to do. The only proof presented in that behalf was to the effect that the consideration of each of the two notes in question was money loaned by the testator in his lifetime to the respective makers of the notes; that the notes were executed by the makers and made payable to the testator or ³⁷⁴ his order, and were delivered to him during his lifetime and had not been assigned. This proof was not sufficient to warrant the court to make an order that the notes should be surrendered by the defendant in error to the representatives of the deceased. The possession of an unindorsed note is *prima facie* evidence of ownership in the holder: *Ransom v. Jones*, 1 Scam. 291; *Curtiss v. Martin*, 20 Ill. 557; 2 *Parsons on Notes and Bills*, 52, 53, 444.

The right to the possession and full beneficial interest in an unindorsed negotiable paper may pass by manual delivery of the paper, and, in the absence of testimony tending to disprove that the notes were delivered, the presumption will obtain that one in the possession of such paper came rightfully into possession.

Hence, this evidence alone considered, it seems clear the finding and order of the court should have been for the defendant in error. But the defendant in error proceeded to produce testimony in her own behalf to sustain her claim of ownership to the notes, and this testimony must be considered to determine whether it disclosed facts and circumstances adverse to her claim upon which the judgment of the trial court can be sustained.

It appeared from the testimony that Edward Martin was a man well along in years at the time of his death. He resided at Red Hook, New York, which place had long been his home. The defendant in error was his niece, and had lived with him since she reached the age of nine years—a period of more than forty years—and for fourteen years before his death had the full charge and care of his home. It was admitted by the parties that some time prior to his final illness he gave to the defendant in error other notes and securities of the aggregate amount of fifty thousand two hundred dollars, all of which he duly indorsed and assigned to her in writing. She kept these securities in a bundle or package enveloped in a wrapper of “curtain calico,” and this package or bundle she kept in a cupboard in the room occupied by her in the house of the deceased. It appeared ³⁷⁵ the deceased was possessed of certain securities which he kept in a tin box having a combination lock, called by him the “rat-proof box.” He kept this box in a clothespress in the room which he occupied and where he slept. It was stipulated the notes in controversy have been in the possession of the defendant in error and her attorneys ever since the death of the testator.

The final illness of the testator began on Saturday, November 25, 1893, and terminated fatally on the morning of Sunday, December 3, 1893. Elizabeth H. Martin, who was a niece and member of the family of the deceased and is a legatee under the will, testified that on either Tuesday or Wednesday prior to his death, and while he was confined to his bed in his last sickness, she passed through his room and saw him “bolstered” up in his bed; that the defendant in error was standing near the bed; that the “rat-proof box” was lying open upon the bed, and the deceased and the defendant in error were engaged in looking at and handling some papers which were in the box; that some of the papers were lying on the bed, and that the deceased was looking at the defendant in error and talking to her.

Margaret J. Martin, a sister of the defendant in error and niece and legatee of the testator, testified she was standing near

the door which opened from an adjoining room into the room where the testator was lying on his bed, on the occasion testified to by Elizabeth H. Martin, and that she saw the deceased sitting up in bed, supported by pillows, with his "rat-proof box" on the bed before him; that the defendant in error was near his bed, and they were engaged in talking; that she saw the defendant in error take the box from the bed of the testator and put it in the place where it was kept in the clothespress, and that the defendant in error came directly to the witness and showed her one of the notes in controversy—the fifteen thousand dollar note given by the Catholic bishop of St. Joseph—and made a remark to her in an ordinary tone of voice; ³⁷⁶ that the bed of the deceased was about nine feet away, and that there was nothing that the witness knew of to prevent him hearing, but that he made no reply. This remark was, that the deceased had given the note to her and told her to put it with her other papers. It was objected to, but was heard by the court and the determination of its competency reserved. This same witness testified that she first saw the other note—that for five thousand five hundred dollars, given by the Catholic bishop of Chicago—about two weeks before the death of the testator and prior to his last sickness; that she, the witness, and the defendant in error, were at the time in the room occupied by the defendant in error in the house of the testator; that the said testator came to the door of the room and asked the defendant in error for her papers; that she went to the closet, unlocked it, took out a package of papers which were done up in a piece of "curtain calico," and handed it to him, and he went away with it; that he soon afterward returned, brought back the package and said to the defendant in error, "Serena, here are your papers," and went away; that the defendant in error opened the package and showed the contents to her, the witness, and that she, the witness, saw there, among other papers, the note for five thousand five hundred dollars given by the Catholic bishop of Chicago and here in controversy. The witness testified that the defendant in error made a remark to her at the time she saw the note, but the court held the remark was not competent to be considered in evidence, and refused to allow the witness to give the remark. Counsel on behalf of the defendant in error then offered to prove by the witness that the defendant in error, at the time in question, stated that the note she, the witness, was looking at—the five thousand five hundred dollar note—was hers; that Martin had given them (the notes in the package) to her; but the court refused to allow the proof to be made.

This witness and one Jackson Jaques testified that on Sunday morning, the same day, and a few hours after the ³⁷⁷ death of the testator, they saw both the notes in controversy; that the defendant in error went to a cupboard in the room occupied by her in the house of the deceased, unlocked the door of the cupboard and took out a bundle wrapped in "curtain calico"; that the defendant in error opened the bundle, and that the witnesses examined the contents thereof; that the bundle contained eleven notes and some trust deeds, among the notes being the two in controversy, which, as both witnesses testify, they saw and identified. The defendant in error offered to prove by these witnesses that at the time the defendant in error exhibited the notes to them she told them the notes were hers; that her uncle, Edward Martin, had given them to her. The court refused to hear the proffered proof, but on a later day, while the cause was still on hearing, allowed the witness Margaret J. Martin to testify the defendant in error stated to her and Jaques at the time in question that the notes in the package, including those in controversy, belonged to her and that the deceased uncle had given them to her. The court, however, reserved decision as to the competency of the testimony, and subsequently sustained the objection to all declarations and statements of defendant in error about the notes in controversy as being incompetent, immaterial, and self-serving.

The defendant in error testified that on Sunday morning after the death of her uncle, the decedent, she took the bundle of securities from her closet and showed them to her sister Margaret and Jackson Jaques; that the two notes in controversy were then in her possession in the package; that she had not put anything in the package after the death of her uncle; that from the time of his death until she went to the closet with her sister and Jaques she had not seen the notes and had not touched the package. This was, in substance and materiality, all the evidence produced in behalf of the defendant in error.

The testimony of one of the solicitors for the legatees under the will of the deceased, who acted as stenographer ³⁷⁸ on the hearing of the cause in the county court, which was produced in rebuttal, tended to show that the said witness Margaret J. Martin testified on that occasion that the deceased seemed to be in his right mind during his last illness and was able to write his name, and that the deceased, when he came into the room and asked the defendant in error for her bundle of papers, said that he wanted the papers for the purpose of indorsing some interest,

and that he put the interest down on them and returned them to her. The witness Margaret J. Martin denied that she made such statements as a witness on the former hearing.

We find nothing in this testimony which can fairly be deemed to militate against the presumption of ownership arising from the possession of the defendant in error, or otherwise to operate adversely to her cause. Upon the contrary, we think a fair and impartial consideration of the testimony sufficiently establishes that the defendant in error came into possession of the notes by acts of the decedent done for the purpose of constituting her the owner thereof. The suggestion she held them for safekeeping, or otherwise, as a mere bailee, cannot be reconciled with the evidence.

We think the court erred in excluding from consideration such of the declarations of the defendant in error as amounted to a statement or claim of ownership in her: *Rigg v. Cook*, 4 Gilm. 336; 46 Am. Dec. 462; *Yates v. Shaw*, 24 Ill. 368; *Rowley v. Hughes*, 40 Ill. 316; *Amick v. Young*, 69 Ill. 542; *Whitaker v. Wheeler*, 44 Ill. 440; *Thomas v. Butler*, 139 Ind. 245. The other of her declarations sought to be proven related to past transactions, and were for that reason incompetent.

We concur in the conclusions reached by the appellate court, that the defendant in error should have prevailed in the circuit court. The judgment of the appellate court is affirmed.

NEGOTIABLE INSTRUMENTS—POSSESSION AS EVIDENCE OF OWNERSHIP.—Possession and the production of a note uncanceled and unextinguished by indorsement of payments, or otherwise, is prima facie evidence that the holder is the owner, and that the note is unpaid: *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258, and note. See *Berney v. Steiner*, 108 Ala. 111; 54 Am. St. Rep. 144; *Middleton v. Griffith*, 57 N. J. L. 442; 51 Am. St. Rep. 617. But mere possession by a third party of unindorsed negotiable paper, payable to the order of the payee therein named, is not even prima facie evidence of title in the holder as against such payee: *Vastine v. Wilding*, 45 Mo. 89; 100 Am. Dec. 347, and note.

EVIDENCE—DECLARATIONS IN PARTY'S INTEREST.—Declarations of a party are admissible as evidence in his own favor when they form part of the *res gestae*, or where such declarations are necessary to explain an act which takes its character from the design and intention of the party who does it: Extended note to *Baker v. Kelly*, 93 Am. Dec. 279. Compare with the principal case, *Card v. Foot*, 56 Conn. 369; 7 Am. St. Rep. 311.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. JENKINS.

[174 ILLINOIS, 298.]

JUDICIAL NOTICE WILL BE TAKEN of the general business affairs of life and of the manner in which ordinary railway business is conducted and of the every-day practical operation of railways.

EMPLOYER AND EMPLOYÉ.—THE DUTY OF GIVING A CLEARANCE CARD or letter of recommendation to an employé discharged or quitting the service of the employer was not imposed by the common law, and does exist in the absence of any statute or contract creating it or a well-settled usage or custom on the part of the employer to grant such cards or letters.

USAGE OR CUSTOM.—TO ESTABLISH a usage or custom, it is not sufficient to prove isolated instances. It must be positively established as a fact, and not left to be drawn as a matter of inference from transactions.

A USAGE WHICH IS TO GOVERN A QUESTION OF RIGHT should be so certain, uniform, and notorious as probably to be known and understood by the parties as entering into their contract.

JURY TRIAL — DAMAGES — INSTRUCTIONS RESPECTING.—An instruction to a jury that in certain contingencies they should find for the plaintiff and fix his damages at such sum as they thought right, not exceeding the amount specified in the complaint, is erroneous. The verdict should be based upon evidence rather than upon what the jury think right.

A RAILWAY IS NOT UNDER ANY OBLIGATION to give employés discharged or leaving its employment a clearance card or letter of recommendation, though it is necessary to enable them to obtain employment elsewhere.

EVIDENCE OF TRANSACTIONS WITH WHICH THE PARTY AGAINST WHOM IT IS OFFERED is not connected is not admissible. Hence, in an action against a railway corporation for not giving an employé a clearance card on leaving its employment, evidence that other railway corporations were in the habit of giving such cards to their employés is not admissible.

Action by Jenkins against the defendant railway corporation claiming that he had been a faithful employé of it for ten years as a conductor on one of its freight trains, that he was discharged without cause, that by the regulations and custom of the defendant, a letter or clearance card was usually given to discharged employés to enable them to secure employment on other roads, that such card had been refused to him, whereby he had been prevented from procuring employment, that there was a rule or custom between defendant and other railway corporations, which was claimed amounted to a conspiracy, not to employ a discharged employé of another road without a letter or clearance card, that the plaintiff had applied at various railway corporations for employment, which had always been refused on

account of his not having such card, and thereby he had been prevented from earning eighty-five dollars per month, which he could have earned in his employment as conductor. Verdict for the plaintiff awarding him eight hundred and seventy-five dollars damages. The defendant appealed to the appellate court, where the judgment was affirmed, and thereafter a further appeal was prosecuted to this court.

John T. Dye, C. S. Conger, and H. M. Steely, for the appellant.

Mundy & Organ, and Cullop & Kessinger, for the appellee.

⁴⁰¹ PHILLIPS, J. The gravamen of the declaration in this case is, that the plaintiff was discharged and refused a clearance card or letter to which he was entitled, without which he could not obtain employment on any other road, and that he failed to obtain such employment, whereby he suffered damages. The declaration avers a cause of action on the case arising out of a contract. It avers a contractual relation, out of which, as alleged, arose the duty, when such contractual relation was severed, to give a letter or clearance card for the purpose stated. Unless the law imposes on appellant, in some form, the duty to give appellee, as one of its employes, a letter of recommendation or clearance card, his action in this case cannot be sustained. If a legal duty is imposed upon the employer to give to a discharged employe, or one voluntarily leaving his service, a letter of recommendation, such duty must arise either by the common law, by statute, by contract of employment, or by such a generally established usage or custom as would demand it be done. Such usage, however, must be so well known and uniformly acted upon as to raise a fair presumption it was intended to be incorporated in the contract of employment.

A distinction is to be made between what is known, in terms, as a clearance card and a letter of recommendation. ⁴⁰² This distinction is apparent, not only from the evidence in this case, but also from the knowledge which courts have of the general conduct and management of railroad business and affairs. It is the duty of courts to take, and they will take, judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the every-day practical operation of them: *Slater v. Jewett*, 85 N. Y. 61; 39 Am. Rep. 627; *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258; 41 Am. Rep. 161.

From the evidence produced on this question, and from this

judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a clearance card is simply a letter, be it good, bad, or indifferent, given to an employé at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment.

As stated, an action for failure to give an employé either of the above forms of letters must be based either upon the common law or the statute, or arise out of the contract of employment, or be required by usage or custom. By the common law no such duty was imposed upon the employer. In the American and English Encyclopedia of Law, volume 14, page 799, it is said: "It is not legally compulsory on a master or mistress to give a discharged servant any character, it matters not how much ⁴⁰³ a servant is entitled to character in fairness or how cruel the refusal might be." In Townshend on Slander and Libel, fourth edition, page 425, it is said: "On examination, it will be perceived that this right of an ex-employer to give, as it is termed, a 'character' to his ex-employé is nothing more than a consequence of the right to communicate one's belief. . . . No one is under any obligation to make such a communication. He does not owe it as a duty, either to the employer or the employé, to make any communication on the subject." In the case of Ohio etc. R. R. Co. v. Kasson, 37 N. Y. 224, which involved a similar question, in the opinion it was said: "If I know that a villain intends to defraud or in any way injure my neighbor, it is doubtless my duty, as a good citizen and as a christian man, to put him on his guard. But there is no rule of law which renders me liable for his loss in case of my neglect of this duty. It is a moral duty, simply—not recognized by law." In Smith on Master and Servant, textbook edition, pages 380, 381, it is said: "It is clear, however, that, in the absence of any specific agreement to that effect, there is no legal obligation binding a person who has retained

another as a servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so." In *Carroll v. Bird*, 3 Esp. 201, it is set forth in the declaration that the plaintiff's wife, having been retained by the defendant as a servant, was dismissed from the service; that after she was so dismissed she applied to a person of the name of Stewart for the purpose of being retained and hired as a servant; that Mrs. Stewart was ready and willing to have hired and taken her into her service if the defendant would have given her a character and that such character was satisfactory; that it was the duty of the defendant, by law, to have given her such character as she deserved; that the defendant, not regarding her duty, wholly refused to give her any character whatever, by reason of which the said Mrs. Stewart refused to hire her ⁴⁰⁴ into service. In the opinion rendered in this cause Lord Kenyon said: "There was no case, nor could the action be supported by law. By some old statutes regulations were established respecting the characters of laborers, but in the case of domestic and menial servants there was no law to compel the master to give the servant a character. It might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it."

A character is not given for the benefit of the ex-employé, although he may be either injured or benefited by reason of such a character being given; nor does the right to give such a character arise out of the duty to the employer, but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employé has a legal right to demand it. Such communications have been made not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good and as a moral duty to society, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information: *Sunderlin v. Bradstreet*, 46 N. Y. 188; 7 Am. Rep. 322; *Moot v. Dawson*, 46 Iowa, 533; *Townsend on Slander and Libel*, 4th ed., 395-397; 13 Am. & Eng. Ency. of Law, 415, 416; *Bacon v. Michigan Cent. R. R. Co.*, 66 Mich. 166. In *Parsons on Contracts*, page 328, the author says: "The master is under no legal obligation to give a testimonial of character to his servant." It is also a well-known rule of law that no man is compelled to enter into business relations with any other per-

son unless he desires so to do, and it is also as well established that upon the dissolution of such business relations no man shall be compelled to divulge to ⁴⁰⁵ the public his reasons, good or bad, for such dissolution. In Cooley on Torts, page 328, it is said: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern."

A further citation of authorities is unnecessary to establish that by common law no liability was imposed upon the master to issue any form of character to his servant. By statute no duty is imposed upon the employer to give to an employé a clearance card, nor does any right to demand such accrue to the employé. Therefore, if any cause of action exists to the appellee in this case it must arise out of his contract of employment, or there must be shown and established such a custom or usage as would clearly entitle him to such. Under such views of the subject matter involved in this case, where no action, either by law or by statute, accrued to the plaintiff, it was necessary for him to produce, in the first instance, evidence tending to show that a usage or custom existed on appellant's railroad, at the time of his contract of employment, to give to each discharged employé, or those voluntarily quitting its service, a clearance card or certificate of evidence, and tending to show he was entitled to it under his contract of employment.

The fact that the master requires certificates of recommendation from persons seeking employment is certainly no reason why he should be legally compelled to give certificates to those leaving his employment. In this case the testimony produced, showing or tending to show that appellant required certificates of recommendation from persons seeking employment with it, does not in any manner tend to establish the fact that it gave to persons leaving its employment certificates of like character. For the purpose of establishing the existence of a usage or custom under which appellee was entitled to ⁴⁰⁶ a clearance card a number of witnesses were offered on the trial. The witness Baker had worked for the predecessor of the appellant road, but had never worked for appellant. At the time he quit its employ he had not received a clearance card, nor had he ever seen but one such card issued by the appellant road, and that by a master mechanic. Another witness, Bedell, had worked for appellant, but on retiring from its service had received no card, and apparently, from his

testimony, was refused one. Still another witness, Shearer, offered by appellee, had never worked for appellant, but had worked for other companies, and testified that he did not know positively what custom or usage existed. The witness Hunt worked for appellant, and on retiring from its service, in 1894, asked for a clearance card, but did not get one. Shields, another witness, worked for appellant in 1891, and on retiring from its service received a letter of recommendation, which was introduced in evidence. The letter is purely personal in its character, and shows on its face it was written and intended for the witness, and was not a general form which would be given to other employés. This witness had never seen any other card or letter issued by the appellant except his own. He produced a number of letters of recommendation, or, as they might be termed, clearance cards, from other roads, which were admitted over the objection of the appellant, with the understanding the appellant road should be connected with them in order to make them admissible, and that it should be shown they were issued by other roads in accordance with an understanding or agreement in which appellant took part. No such connection was made, however, and such letters issued by other roads were not admissible. For the purpose of proving the usage or custom on the part of the appellant road, therefore, the only evidence offered was one letter, purely personal in its character, and the statements of several witnesses that such a custom or usage existed, but without ⁴⁰⁷ any apparent knowledge on which to make such statements. No other evidence was produced tending to show that appellant issued such cards or letters, or that it required them before employing its servants. A number of the witnesses above named, offered by the appellee, testified that on leaving the service of appellant they had received such letters or cards. The positive and direct testimony of the superintendent of the appellant road—the person charged with the duty of issuing such clearance cards or letters of recommendation if any were to be issued—is that no custom or usage existed, and that it was of rare occurrence that an employé leaving its service received a letter of any character.

To establish a usage or custom it is not sufficient to prove certain isolated instances. The usage must be positively established as a fact, and not left to be drawn, as a matter of inference, from transactions: 27 Am. & Eng. Ency. of Law, 728. A usage which is to govern a question of right should be so certain, uniform, and notorious as probably to be known to and understood by the parties as entering into their contract (*United States v. Duval*, Gilp.

356), and cannot be proved by a single, isolated instance: *Dean v. Swoop*, 2 Binn. 72. See, also, *Janney v. Boyd*, 30 Minn. 319; *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 199. So, also, it is held that particular instances of a certain practice in a bank do not establish a usage: *Allen v. Merchants' Nat. Bank*, 22 Wend. 215, 34 Am. Dec. 289, nor instances in one or two banks other than the one concerned in the alleged usage: *Chesapeake Bank v. Swain*, 29 Md. 501. In *Herring v. Skaggs*, 73 Ala. 446, it was held that a custom is a fact, and is as capable of proof as any other fact; that it may be proved by evidence of facts and instances in which it has been acted upon, but is not proved by evidence that it was acted upon in a few particular instances of dealing, nor is such evidence admissible to establish its existence.

It is apparent, therefore, that a custom or usage, to be binding, must be so uniform, long established, and generally ⁴⁰⁸ acquiesced in, and so well known, as to induce the belief that parties contracted with reference to it, if nothing is stated to the contrary, and that the failure to conform to it would be an exception: *Bissell v. Ryan*, 23 Ill. *566 (517); *Wilson v. Bauman*, 80 Ill. 493. A custom must be general and uniform. It must be certain, reasonable, and sufficiently ancient to afford the presumption that it is generally known: *Turner v. Dawson*, 50 Ill. 85, and must not be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties or against the established principles of law. Besides this, it must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it: *Turner v. Dawson*, 50 Ill. 85; *Packard v. Van Schoick*, 58 Ill. 79; *Papin v. Goodrich*, 103 Ill. 86. If it should appear, therefore, from the evidence, as it does in this case, that the foregoing elements are not established, and only a few isolated instances are shown to prove a usage or custom, the court, as a matter of law, should have held that a usage or custom was not thereby established. The evidence must clearly show the rule as above stated, and that a failure to conform with such custom would be unusual.

At the close of the plaintiff's evidence the defendant moved the court to instruct the jury to find for the defendant, which motion was accompanied by an instruction. This motion was renewed at the close of all the evidence in the case. The legal question is, therefore, presented to this court, whether or not there was, at the close of plaintiff's testimony, evidence tending

to establish the material averment in the declaration necessary to be proven, and also whether or not, at the close of all the evidence, it was sufficient upon which to base a verdict if rendered. The rule in this regard is so well established that no citation of authorities is necessary. There ⁴⁰⁹ was no evidence tending to show any general custom or usage existing on the appellant road and entered into between it and other roads, as alleged in the declaration. It is clear the evidence on that question was not sufficient to support a verdict, and the motion offered at the close of plaintiff's evidence and renewed at the close of all the evidence, and accompanied by an instruction to find for the defendant, should have been allowed and the instruction given.

Complaint is also made of the first instruction given for appellee, which tells the jury that, under certain contingencies, "you should find for the plaintiff and fix his damages at such sum as you think right, not exceeding the amount claimed in the declaration." No reference is made to the evidence in the case. This form of instruction is erroneous and has been frequently condemned by this court: *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Chicago etc. R. R. Co. v. Austin*, 69 Ill. 426. In the latter case, where an instruction concluded, "the jury should give the plaintiff such damages as they, under their oaths, can say will be a fair compensation for said injury, not exceeding, however, the sum of ten thousand dollars, the amount claimed in the plaintiff's declaration," this court said: "The law required the jury to determine the liability of the defendant from the evidence, and from that alone, and an instruction which would permit them to enter into an open field of investigation cannot be sustained." The instruction was erroneous in not confining the jury to the evidence in considering their verdict.

The second instruction given for appellee is subject to the same criticism, and was also erroneous, and should not have been given without modification. Errors are also assigned as to the other of appellee's instructions, but it is not necessary in the condition of this record to discuss them.

It is also assigned as error by appellant that the letters of character or recommendation written by officials ⁴¹⁰ of other roads were improperly admitted in evidence against appellant. The specific objection made by appellant to this evidence was its incompetency unless appellant should be in some way connected with such letters; that it should be shown to have had knowledge and approval of their issuance, and be shown to have been a participant in a common plan or understanding that letters of

such character should be given to discharged employes of such roads and that such letters be required as a condition precedent to employment. For no other purpose could these letters issued by officials of other roads be admitted as evidence against this particular appellant. If such a common understanding or conspiracy as charged in the declaration existed and was unlawful, it was certainly necessary to in some manner connect appellant with it. This the appellee entirely failed to do, and the letters should not have been permitted to go to the jury.

In this case it is not shown, or even attempted to be shown, that appellee, at the time of his contract of employment with appellant, and as an incident of such employment, received any assurance that he would, at the time of his expiration of service, receive any clearance card or letter of recommendation from the appellant railroad. A rule in force on appellant's road, and known as rule 13, was offered in evidence, which reads as follows: "If a conductor is taken off his run for any cause, he shall be granted a full investigation, hearing, and decision within five days, at which time he shall have the right to have another conductor of his own selection to appear and speak for him, and shall have the right to appeal from the decision of a special to the general officers of the road. If exonerated, he shall receive pay for time lost." Appellant contends, and properly so, that this rule had no application to appellee's case. It was meant and intended to apply to cases in which a conductor, for some violation or infraction of appellant's rules or reported ⁴¹¹ improper conduct, should be suspended. In this case appellee had been indicted by the grand jury of Johnson county for an alleged violation of the criminal law of the state. The only proper vindication was by a nolle of those indictments or an acquittal by a trial jury. Such could not reasonably occur in five days, nor could appellant, by its rule, fix any time. Its own investigation would stand for naught. The other provisions of the rule show clearly it has no application to this kind of a case. This rule could in no sense be said to constitute any part of the contract of employment, as it only appears to have been adopted in 1890 and appellee had been in the service of the company some six years or more before that time. There being no other evidence tending to show appellee was entitled to a clearance card as part of his contract of employment, his action could not be maintained on that ground.

Another rule said to have been in existence on appellant's road is averred in the declaration. No such rule appears in the record,

however. A rule numbered 11 (presumably this rule) was offered to be introduced by plaintiff below in rebuttal, not for the purpose of showing the effect of the rule, but to contradict the statements of two witnesses of defendant who had been asked whether or not such a rule was in existence. From the record it would appear the rule, if in force, applied to engineers and brakemen, but not to conductors, and the court on this ground, or for the reason the contradiction would be as to immaterial matter, refused to admit it. No cross-errors are assigned by appellee upon the action of the court in so doing, but an examination of the record indicates the trial court committed no error in that respect. Had such a rule applicable to conductors, providing for the issuing of clearance cards, as alleged in the declaration, been offered and established as a part of plaintiff's case, a different question might have been presented for the consideration of this court. In the condition ⁴¹² of this record, however, where no usage or custom was shown to exist under which appellee could recover, and no provision incident to his contract of employment imposing upon appellant the duty to issue a clearance card or certificate, his action must fail.

For the errors herein indicated the judgment of the appellate court for the fourth district and the judgment of the circuit court of Wabash county are reversed and the cause remanded.

EVIDENCE—JUDICIAL NOTICE—COURSE OF BUSINESS.—As a matter of ordinary and common knowledge, courts will take judicial notice of the changes in the course of business in the country, and of new processes of practical utility in facilitating trade, and will consider such innovations in adjusting the rights of parties: See monographic note to *Lanfear v. Mestier*, 89 Am. Dec. 696; *Davis v. Kobe*, 36 Minn. 214; 1 Am. St. Rep. 663.

CUSTOM—ESSENTIALS TO MAKE ADMISSIBLE IN EVIDENCE.—A usage, to be admissible, must be proven to be known to the parties, or to be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform: *Baltimore Baseball Co. v. Pickett*, 78 Md. 375; 44 Am. St. Rep. 304, and note. A custom cannot be good unless it is reasonable: *Dempsey v. Dobson*, 184 Pa. St. 588; 63 Am. St. Rep. 809, and note. See monographic note to *Governor v. Withers*, 50 Am. Dec. 97-105.

DAMAGES — INSTRUCTIONS.—An instruction is erroneous where it permits the jury to go beyond the evidence in fixing the amount of damages, and to allow themselves to be influenced by their own experience with mankind: *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206. See *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458; 43 Am. St. Rep. 259.

Remy & Mann, for the appellant.

E. R. Bliss, for the appellee.

⁴⁹⁰ **MAGRUDER, J.** The ground upon which the trial court found for the appellee in this case is stated in proposition No. 15, held by the court of its own motion to be the law in the decision of the case. That proposition, considered in connection with propositions numbered 7 and 8, as modified and held to be the law by the court below, was erroneous.

It is not claimed that the bill of sale, which is alleged to have been executed by Tewksbury and Frederick S. Eames to Henry F. Eames in the latter part of October, 1893, was an absolute transfer of the title to the personal property in the hotel. Such bill of sale is conceded to have been merely a security for the indebtedness, alleged to have existed in favor of Henry F. Eames from Tewksbury and Frederick S. Eames. Of course, the bill of sale, not having been acknowledged or recorded in accordance with the requirements of the chattel mortgage act, was not valid, as against creditors and third persons, unless the mortgagee, Henry F. Eames, was in possession of the property. It is claimed that Henry F. Eames was in possession through the manager of the hotel, Hanna. The proof shows conclusively that Hanna was manager of the hotel for Tewksbury and Frederick S. Eames before the execution of the bill of sale, and ⁴⁹¹ continued to act as manager thereafter. The proof also shows that Hanna made reports to Tewksbury and Frederick S. Eames, as well as to Henry F. Eames, after the execution of the bill of sale, and that he operated the hotel for the grantors in the bill of sale after its execution, as he had done theretofore. The grantee in the bill of sale was the father of Frederick S. Eames, the judgment debtor, and one of the grantors in the bill of sale. When the known and previously recognized agent of an alleged vendor remains in possession of personal property, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title. The change in the character of the possession should be indicated by such outward, open, actual, and visible signs as can be seen and known to the public, or persons dealing with the property: *Martin v. Duncan*, 156 Ill. 274; *Brunswick v. McClay*, 7 Neb. 137; *Doyle v. Stevens*, 4 Mich. 87; *Porter v. Parmley*, 52 N. Y. 185. Where parties to such a transfer are near relations, clearer and more convincing proof is required of the good faith of the transaction than when they are strangers: *Martin v. Duncan*, 156 Ill.

274. Notwithstanding the fact that the same manager, who had operated the hotel for the grantors in the bill of sale, still continued to manage it after the execution of the bill of sale, and notwithstanding the relationship which existed between one of the grantors in the bill of sale and the grantee, the trial court found that there was an actual delivery under the bill of sale to Hanna for Henry F. Eames. We would not be disposed to disturb this finding of fact by the trial court, if the propositions held as law were correct. The apparent want of change in the character of the possession after the execution of the bill of sale, and the near relationship existing between one of the grantors therein and the grantee, are strong circumstances tending to throw suspicion upon the bona fides of the transfer. Still, the ⁴⁹² force of these circumstances may be overcome, when the proof is sufficient to show good faith and an actual change of possession.

It may be assumed, therefore, that the finding of the trial court as to a change of the possession was justified by the evidence. If there was an actual and bona fide change of possession, so that, after the execution of the bill of sale, Henry F. Eames was in the possession of the property in the hotel, then there is presented the case of a mortgagee of personal property, who is in actual possession of the same. Where the possession of personal property is transferred from the mortgagor in a chattel mortgage to the mortgagee therein before the rights of creditors actually intervene, the mortgagee will hold the property, and a levy cannot be made thereon: *Martin v. Duncan*, 156 Ill. 274; *Read v. Wilson*, 22 Ill. 377, 74 Am. Dec. 159; *Brown v. Riley*, 22 Ill. 46; *Frank v. Miner*, 50 Ill. 444.

So long as Eames was in possession of the property, as mortgagee under the bill of sale, the appellant could not insist upon a levy being made by the sheriff under the execution issued upon its judgment. While, therefore, the bill of sale was in force and the possession of the grantee therein continued under it, the statement in proposition No. 15, as held by the court, was correct. But the proof shows that, on December 5, 1893, while the execution of appellant was yet alive, the grantee in the bill of sale, who was in fact a mere mortgagee, accepted from Frederick S. Eames and his partner, Tewksbury, a chattel mortgage upon the property in the hotel. This chattel mortgage was duly acknowledged, and entered upon the docket of the justice of the peace, who took the acknowledgment, and was recorded in the recorder's office on December 20, 1893. After this day, to wit, on December 23,

1893, the attorney of the appellant stated to the sheriff that the judgment debtor, Frederick S. Eames, owned property in the hotel subject to levy. We are of the opinion that it was then the duty of the sheriff to levy upon ⁴⁹³ the property subject to the chattel mortgage. Although property embraced in a chattel mortgage cannot be levied upon while the mortgagee is in possession, yet it can be levied upon where the mortgagor is in possession, and the mortgage given by him is executed in accordance with the statute. Where a mortgagee of chattels is in possession after condition broken before the rights of creditors have attached, his title to the chattels becomes absolute at law: *Whittemore v. Fisher*, 132 Ill. 243.

But here the mortgagee, Henry F. Eames, changed his attitude and possession. The mortgage accepted by him, which was executed on December 5, 1893, contained a statement that the mortgagors were in possession of the property, and that they were lawfully possessed thereof "as of their own property." After accepting such a mortgage, Henry F. Eames was estopped from denying the truth of the statements therein contained. It is well settled in this state that, when a chattel mortgage is properly acknowledged and recorded, a third person, who is a creditor of the mortgagor, may levy an attachment or execution upon the property in the possession of the mortgagor: *Barchard v. Kohn*, 157 Ill. 579; *Beach v. Derby*, 19 Ill. 617; *Pike v. Colvin*, 67 Ill. 227; *Durfee v. Grinnell*, 69 Ill. 371; *Dunlap v. Epler*, 88 Ill. 82; *Gaar v. Hurd*, 92 Ill. 315; *Simmons v. Jenkins*, 76 Ill. 479; *Spaulding v. Mozier*, 57 Ill. 148.

It follows from what has been said that the modifications, which the trial court made of propositions, numbered 7 and 8, were erroneous under the circumstances of this case. The modification made of proposition numbered 7 asserts that the sheriff need not levy on personal property, which had a prior mortgage on it. This was not a correct statement of the law as to the property in the hotel after the execution of the chattel mortgage on December 5, 1893, and its record on December 20, 1893. The sheriff could have levied, and should have levied upon the property in the hotel when requested to do so ⁴⁹⁴ on December 23, 1893, because, on that date, Frederick S. Eames owned one-half of the furniture, subject to the chattel mortgage executed to his father. This was true, even if the turning over of the possession of the property by Henry F. Eames to his son and Tewksbury did not have the effect of letting in the lien of appellant's judgment ahead of the chattel mortgage executed upon December 5, 1893.

Blatchford v. Boyden, 122 Ill. 657. The modification made by the court of proposition numbered 8, as originally asked, was erroneous, because the execution of the chattel mortgage upon December 5, 1893, superseded the bill of sale, and operated as an abandonment of the possession held thereunder by Henry F. Eames, if there had been any such possession. It makes no difference that the judgment debtor, Frederick S. Eames, did not come into the possession of the property as owner, until after the mortgage of December 5, 1893, had been executed and recorded. This is true because he obtained such possession as owner during the life of the execution. The law is, that the lien of a judgment in the hands of a proper officer attaches to all property which the debtor owns, or which he may acquire during the life of the execution. The lien attaches to property acquired by the judgment debtor at any time while the execution is in force: *Blatchford v. Boyden*, 122 Ill. 657; 1 *Freeman on Executions*, sec. 197; *Shafner v. Gilmore*, 3 *Watts & S.* 438.

A sheriff, failing to levy on personal property in the possession of the judgment debtor, can only discharge himself from liability by showing that the property was not subject to levy; and the burden of proof is upon the officer. Where he neglects to levy upon personal property in possession of the defendant, he must either show that the property was exempt from execution, or must establish such facts as justify his failure to make the levy: *Bonnell v. Bowman*, 53 Ill. 460; *People v. Palmer*, 46 Ill. 398; 95 *Am. Dec.* 418; *Dunlap v. Berry*, 4 *Scam.* 327; 39 *Am. Dec.* 413; 1 *Freeman on Executions*, secs. 107, 200; 2 *Freeman on Executions*, sec. 252.

⁴⁹⁵ There is much discussion in the briefs of counsel upon the questions, whether the circumstances justified the sheriff in demanding an indemnifying bond as a condition precedent to making a levy, and whether, if he was justified in calling for such a bond, the bond presented to him was such a sufficient security as the statute requires: *Rev. Stats.*, c. 77, sec. 43; 2 *Starr & Curtis' Annotated Statutes*, 1408. But we do not deem it necessary to discuss, or pass any opinion upon, these questions, as the court below based its finding in favor of the appellee solely upon the theory that, after the mortgage of December 5, 1893, was executed, the previous bill of sale was still in force, and the grantee therein was still in possession of the property as mortgagee.

For the reasons above stated, the judgments of the appellate court and of the circuit court are reversed and the cause is remanded to the circuit court.

CHATTEL MORTGAGES—VALIDITY—CHANGE OF POSSESSION.—A mortgage of chattels must be recorded or the property must be delivered to, and retained by the mortgagee: *Moors v. Reading*, 167 Mass. 322; 57 Am. St. Rep. 460, and note; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; 63 Am. St. Rep. 302. Retention of possession by the mortgagor is presumptive evidence of fraud: *Haven v. Low*, 2 N. H. 13; 9 Am. Dec. 25; but this presumption is rebuttable by evidence of the good faith of the transaction: *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224; 47 Am. St. Rep. 753; and terminates when he surrenders such possession to the mortgagee: *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224; 47 Am. St. Rep. 753.

EXECUTIONS—CHATTELS MORTGAGED.—The interest of a mortgagor in mortgaged chattels in the possession of the mortgagee may be levied upon under execution, but they cannot be taken from the mortgagee without an offer to pay the mortgage debt: *Fox v. Cronan*, 47 N. J. L. 493; 54 Am. Rep. 190. Compare *McKnight v. Gordon*, 13 Rich. Eq. 222; 94 Am. Dec. 164. After the default of a mortgagor of chattels, he has no interest in the mortgaged property subject to execution against him: *Leadbetter v. Leadbetter*, 125 N. Y. 290; 21 Am. St. Rep. 738; *Manchester v. Tibbetts*, 121 N. Y. 219; 18 Am. St. Rep. 816, and note; *Ex parte Lorenz*, 32 S. C. 865; 17 Am. St. Rep. 862, and note.

EXECUTION—LIEN OF.—An execution binds personal property from the time it is delivered to the sheriff: *Collingsworth v. Horn*, 4 Stew. & P. 237; 24 Am. Dec. 753; *Million v. Riley*, 1 Dana, 339; 25 Am. Dec. 149; whether the goods are actually levied upon or not; and a subsequent sale of them by the debtor is void: *Beals v. Allen*, 18 Johns. 363; 9 Am. Dec. 221, and note. Compare *Johnson v. Gorham*, 6 Cal. 195; 65 Am. Dec. 501, and note; *Knox v. Webster*, 18 Wis. 406; 86 Am. Dec. 779, and note.

EXECUTION—FAILURE OF OFFICER TO LEVY—LIABILITY.—An officer, although indemnified, is not bound to levy if in good faith he believes the property exempt, or that the levy would be illegal: *Coville v. Bentley*, 76 Mich. 248; 15 Am. St. Rep. 312, and note. The defense that there was no property to be found liable to seizure, belonging to the judgment debtor named in the execution, is always open to the officer, whether indemnified or not, and is a good defense in an action for a refusal to levy: *Coville v. Bentley*, 76 Mich. 248; 15 Am. St. Rep. 312; but he will not be excused where his inability to levy was the result of his own voluntary act or conduct: *Garrett v. Hamblin*, 11 Smedes & M. 219; 49 Am. Dec. 53.

SMITH v. WILLARD.

[174 ILLINOIS, 533.]

A RESULTING TRUST IN FAVOR OF A WIFE IS PRESUMED from the purchase of property by her husband with her moneys and the taking of the title in his name.

MARRIED WOMAN—ESTOPPEL OF TO CLAIM PROPERTY AGAINST HUSBAND'S CREDITORS.—If a married woman furnishes money to her husband for the purpose of purchasing property for her, instructing him to take a conveyance in her name, and he, on the contrary, takes it to himself, which she permits to stand for seven years and without making any inquiry respecting it, she is estopped, as against his creditors, from claiming that the property is held by him in trust for her.

EQUITABLE ESTATE—PURCHASER WITHOUT NOTICE OF.—A bona fide purchaser of the legal estate will be protected against the prior equitable estate of another of which he had no notice.

A JUDGMENT CREDITOR, BEFORE THE FILING OF A DEED FOR RECORD, occupies the position of a purchaser under the statutes of Illinois, and will acquire title as against such deed by sale of the property under execution, though notice of the deed is given to him prior to the sale.

Suit in chancery by Eliza B. Smith to set aside a sheriff's deed upon certain real property. This property had been purchased in 1888, and paid for by the complainant with moneys constituting part of her separate estate. She claimed that she instructed her husband to take a conveyance in her name, that he brought the deed home and placed it in a bureau drawer, telling her that it was all right, and that she made no examination of it and did not, until May, 1895, discover that it had been made to her husband. She then requested him to convey the property to her. This he did in June, 1895, but his conveyance was not recorded until March 30, 1896. In November, 1895, a judgment was recovered against the husband in favor of the defendant herein, John Willard. Execution on this judgment was issued in March, 1896, and the land in controversy was sold thereunder on the eighteenth of April following. At the time and place of sale, and before the sale took place, the complainant gave oral notice to the defendant of her claim to the property. He nevertheless bid it in at the sale and afterward received a sheriff's deed therefor. The chancellor found in favor of the defendant and dismissed the complainant's bill, and she thereupon appealed.

A. G. Crawford, for the appellant.

W. E. Williams and W. L. Coley, for the appellee.

543 PHILLIPS, J. Under the assignment of error in this

case it is urged and argued by appellant that the circuit court erred in dismissing her bill, for the reason the evidence offered was sufficient to entitle her to a decree setting aside the deed of the defendant as a cloud upon her title. It is also urged the land in question having been purchased by the husband with money belonging to his wife, a resulting trust was established in her favor.

From the record in this case there can be no question but the money of appellant was used in the purchase of these lands. The rule is well established if the husband purchase lands with the separate estate of his wife, or with proceeds or accumulations from it, and takes the title in his own name, a trust results to the wife: 1 Perry ⁵⁴³ on Trusts, 3d ed., sec. 127; Lathrop v. Gilbert, 10 N. J. Eq. 344; Cass v. Demorest, 37 N. J. Eq. 393; Fillman v. Divers, 31 Pa. St. 429; Hay v. Martin (Pa., May 21, 1888) 13 Cent. Rep. 217, Radcliff v. Radford, 96 Ind. 482. The whole foundation of a resulting trust is the ownership and payment of purchase money by one and the taking of title in the name of another, and the presumption, founded on such transaction, of the intention of the parties that such trust should result. In this case, where the purchase money was that of the wife and the title taken in the name of the husband, there is a disputed question of fact as to whether or not she consented or agreed that the title should be so taken. She says she had no knowledge of such fact until seven years after the execution of the deed. Whether or not appellant directed her husband to have the deed executed to her, it is apparent after that time she had ample opportunity to know, and in justice to third interested persons she should have known that her directions were complied with. She was a woman possessing the advantages of a common and boarding school education, and said to be shrewd in business matters. The deed in question was for seven years in a bureau drawer in her house, consisting of two rooms. To the place where it was deposited she had free access, and it would appear a woman of her abilities, having furnished the money for the purchase of the land, and having been so explicit, as she has stated, in directing that the deed should be taken in her name, would at least have manifested enough further interest in the transaction to have ascertained the fact.

Where a married woman holds out to the world that her husband is the owner of property in which she has a resulting trust, or permits him to so act as to induce others to believe he is the owner of such property or has power to bind her, third persons

acting reasonably on the strength of such belief, and giving credit to him thereupon, will be protected: *Anderson v. Armstead*, 69 Ill. 452; 14 Am. & Eng. Ency. of Law, 646. The party who sold⁵⁴⁴ the land to appellant, however, testifies the deed which was executed to the husband was so ordered to be made, and was delivered in the presence of both the husband and the wife at the time the purchase money was paid. The husband afterward rented the land and collected such rents. Evidence is offered tending to show that the land was considered by people in the neighborhood as belonging to the appellant. Such evidence, however, is of no great value, unless it had the effect of bringing notice to appellee, at the time he extended credit to the husband of appellant, that the husband was not the actual owner of the land.

We do not deem it necessary to discuss the authorities cited by appellant tending to show that she held a resulting trust in this land by reason of having furnished the purchase money, and that her husband simply held the land as trustee for her. Had this been a bill filed by her to establish such resulting trust, and where the rights of third parties had not intervened or attached by reason of any omission or laches on her part, the evidence would clearly entitle her to a decree vesting in her the title to this land. The question is now presented, however, whether, after the title to this land has remained in the husband for a period of seven years or more, and by proper diligence appellant might have ascertained that fact, there was a duty imposed upon her to know that her directions as to the execution of the deed were carried out, before she will be permitted to maintain title as against one who has extended credit to the husband on the faith of his apparent title, and secured the lien. The further question is also presented as to whether, after ascertaining the existence of title in her husband and securing from him a deed which would fulfill any trust vested in him, she has, by withholding such deed from record for nearly a year, during which time the rights of her husband's creditors have matured, lost by such act her right to assert title.

⁵⁴⁵ At the time of the conveyance by the husband to the wife in fulfillment of this resulting trust it became and was her duty to give such notice as the law requires to all persons that he no longer held any title or interest in these lands. Section 30 of chapter 30 of the Revised Statutes provides as follows: "All deeds, mortgages, and other instruments of writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before,

as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record." While appellant's deed was executed in June, 1895, it was not recorded until March, 1896. Meanwhile the judgment of appellee had been rendered and the lands in question levied upon. The undisputed evidence of appellee in this case shows that he gave credit to the husband of appellant upon the strength of the fact that he was the owner of the land in question. The husband, at the time of the execution of the note on which judgment of appellee was based, stated that he was the owner of this land. There is no attempt on the part of appellant to bring notice to appellee that she held any resulting or other interest in this land, nor is there any evidence which indicates that he had any such knowledge until the day of the sale. He had a right to rely upon the condition of the title of these lands as shown by the record and upon the representations of the husband that he was the owner, and in the absence of evidence indicating any knowledge of appellant's interest, appellee had the legal right to give credit to the husband under the belief that he was the actual owner. "The law is well settled that a bona fide purchaser of the legal estate will be protected against the prior equitable title of another of which he had no notice": *Robbins v. Moore*, 129 Ill. 30. So, also, in the same case it was said, that "although the grantee ⁵⁴⁶ in a deed may hold the legal title in trust for another, a third person may acquire the title from the trustee if he has no notice of the trust and acts in good faith": *Peck v. Arehart*, 95 Ill. 113; *Emmons v. Moore*, 85 Ill. 304; *McDaid v. Call*, 111 Ill. 298; 2 *Pomeroy's Equity Jurisprudence*, 770; *Bradley v. Loose*, 99 Ill. 234.

It is insisted by appellant that because she, through her attorney, gave notice on the day of the sale of this land by the sheriff that she was the owner of it and that it had been purchased with her money, that was sufficient to charge appellee with notice of such fact, and defeat his lien if her claim was well founded. Section 30 above quoted provides that "all deeds . . . shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice." The deed of appellant in this case was not filed until March 30, 1896. The judgment of appellee had been rendered and execution issued before that time. Appellee, being a judgment creditor before the filing of this deed for record, occupied the same position as purchaser, within the mean-

ing of this statute: *Massey v. Westcott*, 40 Ill. 160; *Martin v. Dryden*, 1 Gilm. 187; *McFadden v. Worthington*, 45 Ill. 362; *Milmine v. Burnham*, 76 Ill. 362; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Munford v. McIntyre*, 16 Ill. App. 316; *Bergman v. Bogda*, 46 Ill. App. 351. The notice, therefore, given or attempted to be given by appellant of her claim or interest in this land after the appellee, by virtue of his judgment and the levy of the execution, occupied the position of purchaser, could in no wise affect or diminish his interest.

A careful consideration of this record and of the reasons presented by counsel for the reversal of this decree furnishes us no ground for disturbing the decree of the circuit court dismissing appellant's bill. The decree of the circuit court of Pike county is therefore affirmed.

TRUSTS—RESULTING—HUSBAND AND WIFE.—When a husband buys property with his wife's money, taking a conveyance in his own name, there arises a resulting trust in her favor, unless a different intention on her part is shown: *Berry v. Wiedman*, 40 W. Va. 36; 52 Am. St. Rep. 866, and note. Compare *Deck v. Tabler*, 41 W. Va. 332; 56 Am. St. Rep. 837, and note.

ESTOPPEL—MARRIED WOMEN.—If a husband purchases land, taking the deed in his own name, and the wife furnishes part or all of the purchase money, with knowledge that the deed is made to her husband, and she suffers the title to remain in him while he receives credit on the faith of his ownership in the land, she is estopped to assert her title thereto as against those who have no notice or knowledge of any claim of ownership on her part, and who have acquired an interest in the land on the faith of the husband's ownership: See monographic note to *Trimble v. State*, 57 Am. St. Rep. 175, on estoppel against married women.

JUDGMENT LIEN—PRIORITY AS TO DEEDS.—The lien of a judgment is preferred to a prior unrecorded deed, in Missouri: *Reed v. Austin*, 9 Mo. 722; 45 Am. Dec. 336. It has priority over a deed executed but not delivered prior to the rendition of the judgment: *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606, and note; and over a conveyance recorded on the day of the judgment's entry, though the indorsement of the clerk shows that the judgment was, in fact, entered after the deed was filed for record: *Hockman v. Hockman*, 93 Va. 855; 57 Am. St. Rep. 816, and note.

BEATTIE v. NATIONAL BANK OF ILLINOIS.

[174 ILLINOIS, 571.]

NAMES.--THE LAW DOES NOT REGARD A MIDDLE INITIAL LETTER as part of a person's name, but only recognizes the christian name of the party.

NEGOTIABLE INSTRUMENTS--INDORSEMENT BY A PERSON OF THE SAME NAME AS THE PAYEE.—Where a bill is payable to the order of a person, and another of the same name obtains possession of it and indorses it to a third person in good faith and for value, the latter acquires no title.

FORGERY.--WHERE THERE ARE TWO PERSONS OF THE SAME NAME, and one of them signs that name to certain notes with the intention that they shall be used in trade as the notes of the other, it is forgery.

NEGOTIABLE INSTRUMENTS.—A FORGED INDORSEMENT OF COMMERCIAL PAPER, THOUGH BY A PERSON HAVING THE SAME NAME AS THE PAYEE, does not pass any title nor justify a payment to the indorser.

The draft sued upon, though intended to be made payable to George P. Bent, was, by mistake, made payable to the order of George A. Bent, and was then mailed to George A. Bent, Chicago, Illinois. It was there received from the postoffice by a man named George A. Bent, who indorsed upon it his own name and sold it to the plaintiff, who was a purchaser in good faith. Payment of the draft was refused upon the ground that it was a forgery. The trial court sustained this view and entered judgment in favor of the defendant, from which the plaintiff appealed.

. Harry Vincent, for the appellant.

Arnold Heap, for the appellee.

573 MAGRUDER, J. The question presented by this record is within a very narrow compass. It is, whether a party, holding a draft under a forged indorsement of the payee therein, or what amounts to a forged indorsement, can compel the drawee to pay him the draft.

It is established clearly by the evidence that the George A. Bent who took the draft from the postoffice and indorsed his name upon the back of it was not the real payee to whom the drawer of the draft intended to ⁵⁷⁴ make it payable. It is true that the real and intended payee and real owner of the draft was named George P. Bent; but the fact that the name of the real owner and the name of the fraudulent possessor of the draft differ, so far as the middle letter of the name is concerned, does not make the case other than a case where the name of the real payee

and the name of the assumed payee are the same. This is so because the law does not regard the middle initial letter as a part of a person's name, but only recognizes one christian name of a party: *Thompson v. Lee*, 21 Ill. 241; *Erskine v. Davis*, 25 Ill. 251; *Miller v. People*, 39 Ill. 457; *Bletch v. Johnson*, 40 Ill. 116; *Humphrey v. Phillips*, 57 Ill. 132.

Where a bill is payable to the order of a person, and another person of the name of the payee gets hold of it and indorses it to a party who takes it in good faith and for value, such party acquires no title to the bill: *Cochran v. Atchison*, 27 Kan. 728. If the indorsement so made by a person who is not the real payee, but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud, his indorsement cannot be regarded otherwise than as a forgery.

In *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49, it was held that where there were two persons of the same name, and one of them signed that name to certain notes with the intention that the notes might be used in trade as the notes of the other, it was a forgery.

Blackstone (4 Blackstone's Commentaries, 247) defines forgery to be the fraudulent making or alteration of a writing to the prejudice of another man's right. "One may be guilty of forgery if he fraudulently signs his name, although it is identical with that of the person who should have signed. Thus, if a bill of exchange is payable to A B, or order, and it comes to the hand of a person named A B who is not the payee, and who fraudulently indorses it for the purpose of obtaining the money, this is a forgery": 575 *United States v. Long*, 30 Fed. Rep. 678. Where an indorsement is made for the purpose of being fraudulently used as the indorsement of another person, it is falsely made. The falsity of the act consists in the intent that the indorsement shall pass and be received as that of some other party; and in such case the charge of forgery can be maintained, although the signature is of a name which might lawfully be used by the person who put it on the draft or bill of exchange: *Commonwealth v. Foster*, 114 Mass. 311; 19 Am. Rep. 353.

In *People v. Peacock*, 6 Cow. 73, where certain coal was consigned to George Peacock of New York, and arrived there and was claimed by another of the same name, who resided in the same city, but was not the true consignee, and he, knowing this, obtained an advance of money on indorsing the permit for the delivery of the coal with his own proper name, it was held that this was forgery.

Nothing is better settled than that a forged indorsement does not pass title to commercial paper negotiable only by indorsement, and does not justify the payment of such paper. Here, whether the indorsement of the payee's name was technically a forgery or was merely a spurious and false indorsement, in either case it was inoperative to change the title to the instrument: *Graves v. American Exchange Bank*, 17 N. Y. 205. In *Graves v. American Exchange Bank*, 17 N. Y. 205, it was held that the drawee of a bill of exchange is bound to ascertain that the person to whom he makes payment is the genuine payee or is authorized by him to receive it; that it is no defense against such a payee that the drawee, in the regular course of business with nothing to excite suspicion, paid the bill to a holder in good faith and for value under an indorsement of a person bearing the same name as the payee. There it was said by the court: "The defendants, on whom the draft was drawn, paid it upon the indorsement of another Charles F. Graves, residing at or near La Salle, who wrongfully took it from the postoffice ⁵⁷⁶ at Mendota. Such a payment, although made in good faith, did not divest or impair the title of the true owner, who had not seen or indorsed the paper."

In *Mead v. Young*, 4 Term Rep. 28, the action was brought by the indorser of a bill of exchange against the acceptor, the bill having been drawn by one Christian on the defendant in London, payable to Henry Davis or order; and having been put into the foreign mail inclosed in a letter from Christian, it got into the hands of another Henry Davis than the one in whose favor it was drawn; the defendant accepted the bill and it was discounted by the plaintiff; it was held that it was competent for the defendant to prove that the person who indorsed to the plaintiff was not the real payee, though he was of the same name, and though there was no addition to the name of the payee on the bill; and it was also held that if a bill of exchange payable to A or order got into the hands of another person of the same name with the payee, and such person, knowing that he was not the real person in whose favor it was drawn, indorsed it, he was guilty of a forgery. In that case Ashhurst, J., said: "In order to derive a legal title to a bill of exchange it is necessary to prove the handwriting of the payee, and, therefore, though the bill may come by mistake into the hands of another person though of the same name with the payee, yet his indorsement will not confer a title." In the same case Bullard, J., said: "I am of opinion that it is incumbent on the plaintiff, who sues on a bill of ex-

change, to prove the indorsement of a person to whom it is really payable. . . . Now, here it is clear that the indorsement was not made by the same H. Davis to whom the bill was made payable, and no indorsement by any other person will give any title whatever."

In the case at bar, when the appellant presented the draft for payment to the appellee, the latter had a right to know that the appellant held the draft under a genuine ⁵⁷⁷ indorsement. When the appellant presented the draft for payment it had been ascertained that the indorsement was forged, or at all events spurious and false, and was therefore void. No title passed by it, and if the appellee had made payment to the appellant, appellee could have been compelled again to pay the draft to the true owner thereof. Daniel, in his work on Negotiable Instruments, says: "The maker of a note or the acceptor of a bill must satisfy himself, when it is presented for payment, that the holder traces his title through genuine indorsements; for if there is a forged indorsement it is a nullity, and no right passes by it. And payment to a holder under a forged indorsement would be invalid as against the true owner, who might require it to be paid again. . . . The payer should also satisfy himself of the identity of the holder; for he cannot defend himself against the real payee by showing that he paid the amount of the bill or note to another person of the same name in good faith and in the usual course of business": 2 Daniel on Negotiable Instruments, 4th ed., sec. 1225. So, also, Randolph, in his work on Commercial Paper, says: "Where a bank holds a note or bill for collection under a forged indorsement and collects and pays it over to its principal, it will still be liable to the real owner for the amount collected. . . . So, if a bill is indorsed by another person in the payee's name and paid to the holder under such indorsement, the payee may recover such payment": 3 Randolph on Commercial Paper, sec. 1469.

It follows from the authorities thus referred to that the appellant, having no title to the draft, was not entitled to recover the amount thereof from the appellee.

If, without knowledge of the real character of the indorsement of the draft by the supposed payee named therein, the appellee had paid the amount of the draft to the appellant, it could have recovered such amount back from the appellant. This results from the fact that "the indorser contracts that the bill or note is in every respect ⁵⁷⁸ genuine, and neither forged, fictitious, nor altered": 1 Daniel on Negotiable Instruments, 4th ed., sec. 672.

Tiedeman, in his work on Commercial Paper, section 259, says: "Inasmuch as the indorser also warrants that he has a perfect title to the paper by indorsement, and is liable if his title proves defective, and since no title passes on a forged indorsement, it follows as a necessary consequence that the indorser must warrant the genuineness of the prior indorsements." Randolph, in his work on Commercial Paper, section 1469, says: "Since the indorser warrants the genuineness of prior indorsements, payment made by the drawee to an indorser holding under a forged indorsement may be recovered from such holder." It was held in *Chambers v. Union Nat. Bank*, 78 Pa. St. 205, that the holder of a draft which is indorsed and passed by him guarantees the prior indorsements. In *Cochran v. Atchison*, 27 Kan. 728, where a bill was payable to W. W. Owens and one W. W. Owen obtained possession of it and wrongfully indorsed it, it was held that a subsequent indorser could not relieve himself from liability to his immediate indorsee on the ground that the latter was guilty of negligence in taking the paper without the name of the actual payee indorsed thereon, upon the grounds that the indorser guarantees the genuineness of the signature of the payee, and that the difference in pronunciation between Owens and Owen was so slight as not to amount to a variance. The court held generally in that case that an indorser warrants the genuineness of indorsements on a bill of exchange. If, therefore, it be true that, upon payment of the amount of the draft to appellant by appellee, a recovery could be had by appellee from the appellant of the amount so paid, upon the ground that appellant by his indorsement had guaranteed the genuineness of the previous indorsement by George A. Bent, it would be useless to hold that a right of recovery exists in favor of the appellant against the appellee. To require ⁵⁷⁹ the appellee to pay an amount which it could hereafter recover back again would be an idle ceremony.

Counsel for appellant claims that he has a right of action for negligence against the First National Bank of Council Bluffs, Iowa, because of the alleged carelessness of that bank, which was the drawer of the draft, in not mailing it properly to the payee named therein. In other words, it is said that, instead of addressing the letter inclosing the draft to George A. Bent of Chicago, it should have addressed it to George P. Bent of 223 South Canal street, Chicago. We do not deem it necessary to decide whether or not an action will lie in favor of the appellant against the Iowa bank. This action is against the appellee bank, and it

is sufficient to say that, so far as this record shows, the appellee was guilty of no negligence.

The judgment of the appellate court affirming the judgment of the circuit court is affirmed.

NAMES—MIDDLE NAME DISREGARDED.—A letter inserted between the christian and surname is not a part of either and may be omitted: *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597, and note; extended note to *Choen v. State*, 21 Am. Rep. 181, 182; *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89. The middle initial of a person's name is material, when only the initial of the first name is given: *State v. Higgins*, 60 Minn. 1; 51 Am. St. Rep. 490, and note.

FORGERY—PERSONS OF SAME NAME.—The essential element of forgery consists in the intent when making the signature or procuring it to be made, even though the name affixed is actually borne by the person affixing it, to pass it fraudulently as the signature of another than the one who actually makes it: *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note; *Barfield v. State*, 29 Ga. 127; 74 Am. Dec. 49. See *State v. Higgins*, 60 Minn. 1; 51 Am. St. Rep. 490. One who procures another, in his presence, to sign to an appeal bond the name of a third person, who resides in another county, but whose name is identical with that of the signer, and also procures such signer to add to the bond the name of such other county, and then utters the bond as having been signed by such third person, is guilty of forgery: *Peel v. State*, 35 Tex. Crim. Rep. 308; 60 Am. St. Rep. 49, and note; see monographic note to *Arnold v. Cost*, 22 Am. Dec. 309.

NEGOTIABLE INSTRUMENTS—FORGED INDORSEMENTS. A forged indorsement of the payee's name passes no title to a negotiable note so as to enable a subsequent indorsee to sue the maker thereon: *Lancaster v. Baltzell*, 7 Gill. & J. 468; 28 Am. Dec. 233; *Jackson v. Commercial Bank*, 2 Rob. 128; 38 Am. Dec. 204; extended note to *Coggill v. American Exchange Bank*, 49 Am. Dec. 315, 316.

CASES
IN THE
SUPREME COURT
OF
KENTUCKY.

GERMAN-AMERICAN INSURANCE COMPANY v. NORRIS.

[100 KENTUCKY, 29.]

INSURANCE—CONDITION PRECEDENT—FURNISHING MAGISTRATE'S CERTIFICATE.—A failure to comply with a provision of a policy of fire insurance that the insured, in case of loss, shall, if required, within sixty days after the fire, "furnish a certificate of the magistrate or notary public living nearest the place of fire, stating that he has examined the circumstances and believes that the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify," is no bar to a recovery thereon, as such requirement cannot be enforced.

INSURANCE—DISCLOSURE OF PREVIOUS ATTEMPT TO BURN—DUTY OF INSURED.—It is not the duty of an applicant for fire insurance to disclose a previous attempt by some one to burn the property sought to be insured unless asked about it.

INSURANCE—NOTICE TO AGENT IS NOTICE TO COMPANY.—If an agent of an insurance company has knowledge of a previous attempt, on the part of some one, to burn property about to be insured, notice to him of such fact is, in law, notice to the company.

INSURANCE—DENIAL OF LIABILITY—PROOFS OF LOSS.—One whose property is insured against loss by fire is not required to furnish proofs of loss, or other papers, where the company, through its general agent, denies liability on the policy and refuses to pay.

B. F. Buckner, for the appellant.

Bullitt & Sheild, for the appellees.

⁸¹ **GUFFY, J.** This appeal is prosecuted from a judgment of the Jefferson circuit court, common pleas division, rendered in the suit of M. T. Norris, et cetera, against the appellant, German-American Insurance Company. The suit was to recover

two thousand five hundred dollars, the amount of a policy issued by the appellant to appellee, Mary V. Norris, on a house then being built in Warwick Villa, Jefferson county, and which was destroyed by fire in December, 1892. The appellant resisted a recovery on five different grounds: 1. That the amount of the loss was not two thousand five hundred dollars; 2. That the appellee had not furnished the appellant with the proofs of loss required by the policy; 3. That it had required a certificate of the nearest ³² magistrate, to the effect that he had investigated the circumstances and believed that the appellee had honestly sustained the loss claimed, and that the certificate had not been furnished, and made like complaint of appellees' failure to furnish bills, items, and specifications, et cetera, of the building as required by the policy and demanded by appellant; 4. That there had been an attempt by some one to burn the property insured before the policy was issued, which fact was not communicated to appellant.

Appellees' contention in substance is, that the appellant denied their claim, hence they were not required by law to furnish anything, but that they did in fact give the notice, furnish the proofs, bills, specifications, et cetera, required by the policy, and that the same was accepted as sufficient, and that they furnished the magistrate's certificate as soon as it could be obtained, and that it was furnished before the institution of the suit of appellees' assignees (who were the real owners of the policy) had been instituted. They also claim that the agent of appellant knew of the burning that had happened, and that it was not known that anyone had set fire to the building or attempted to do so.

The policy contains, among other things, the following: "Within sixty days after the fire, unless such time is extended in writing by this company, the insured shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the ³³ amount of loss thereon; all encumbrances thereon; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the in-

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Appellees' contention in substance is, that the appellant denied their claim, hence they were not required by law to furnish anything, but that they did in fact give the notice, furnish the proofs, bills, specifications, et cetera, required by the policy, and that the same was accepted as sufficient, and that they furnished the magistrate's certificate as soon as it could be obtained, and that it was furnished before the institution of the suit of appellees' assignees (who were the real owners of the policy) had been instituted. They also claim that the agent of appellant knew of the burning that had happened, and that it was not known that anyone had set fire to the building or attempted to do so.

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sured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

The policy also provides that it should be void if the insured has concealed or misrepresented any material facts or circumstances concerning the insurance or the subject thereof.

We think that it clearly appears that notice of the loss and the proofs were furnished as required by the policy, and the bills and specifications of material, et cetera, were also furnished or well known to the appellant.

Appellant insists very earnestly that the failure to furnish the certificate of the magistrate when required is a bar to appellees' right to recover, but we do not think that the policy, when fairly read and construed, constitutes a bar to recovery. It could not be used as evidence against the appellant, and, as there is no law by which the insured could compel a magistrate to act in the matter, it is not reasonable that parties would undertake to procure the certificate of an officer when there was no law by which he could be required to certify at all.

Such a requirement should not be enforced. It could be of no real benefit to appellant, but only an inconvenience ³⁴ to the appellee; but the required certificate was furnished in this case before the trial, and before the filing of the suit of appellees' assignee, which suit was consolidated with this suit.

It is also contended that the policy is void by reason of the concealment of the attempt to burn the building, known to appellee and not communicated to appellant. We do not think that any attempt to burn the house has been sufficiently shown to authorize a forfeiture of the policy, nor are we inclined to hold that it was the duty of appellee to disclose such an attempt unless asked about it; and besides, it is quite reasonable to suppose, from the facts and circumstances proven in the case, that Holland was well aware of all the facts and circumstances in regard to the burning or attempted burning, and whatever may be said as to the extent of his agency, it is clear that notice to him was in law notice to appellant. Holland was the man who really made the trade with appellee, delivered the policy, and collected the premium, and was in the habit of doing such business for the company. His name was indorsed on the policy.

It is in proof that Strong, a confessed agent of the appellant company, looked at the proof and said it would do. If it true he denied so stating. It is also in proof that Thomas, the general and supreme agent for Kentucky and Tennessee, in substance denied the debt and refused to pay, and, if that be true,

appellee was not required to furnish proof or other papers; and it was for the jury to determine as to the truth of the conflicting statements of the witnesses.

²⁵ Appellant also complains of the failure of the court to give instructions asked, including a peremptory instruction to find for defendant, and also insists that those given by the court are erroneous.

The instructions given are as follows:

"No. 1. The court instructs the jury that they should find for the plaintiffs in the sum of two thousand five hundred dollars, with interest from the seventh day of April, 1893, unless they shall believe from the evidence that the defendant did not, within sixty days after the loss complained of in the petition, deny liability under the policy sued on, and that the plaintiffs failed, within sixty days after the loss, to furnish to the defendant or to its agents sufficient proofs of said loss, or that an attempt had been made to burn the house in question before the policy sued on was issued, and that this fact was unknown to the agent of the defendant when he solicited plaintiffs to insure; and that plaintiffs, or either of them, concealed that fact from said agent for the purpose of obtaining insurance.

"No. 2. But if they shall believe from the evidence that, within sixty days after the loss complained of, the defendant denied that it was liable under the policy sued on, then it was not necessary for the plaintiffs to furnish the defendant with proofs of loss.

"No. 3. If the plaintiffs did not, within sixty days after the said loss, furnish to the defendant sufficient proof thereof, then the law is for the defendant, and so the jury should find, unless the defendant demanded other and further proof that it was within the power of plaintiffs to furnish, and plaintiffs did furnish, the ²⁶ further proof demanded within a reasonable time after the same was demanded.

"No. 4. If the jury shall believe from the evidence that an attempt was made to burn the house in question before the policy of insurance sued on herein was issued, and that plaintiffs knew thereof, and that the agent of the defendant, who solicited the insurance (Holland), did not know of the said attempt when the policy was issued, and the plaintiffs concealed that fact from him for the purpose of obtaining insurance, then the law is for the defendant, and so the jury should find."

It seems to us that the foregoing instructions are as favorable to appellant as it was entitled to, and that those asked for by it

were properly refused, nor do we think that the court erred in the admission or rejection of testimony.

It may be that some courts of last resort have announced some rules of law not exactly in accord with this opinion, but this decision is in accord with the former decisions of this court, and is supported by reason and by the fundamental principles of equity: *Howard Ins. Co. v. Owens*, 14 Ky. Law Rep. 881; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330; *Kenton Ins. Co. v. Downs*, 90 Ky. 236.

It may be remarked in passing that it nowhere appears that appellant was in any respect injured or damaged by any of the alleged failures of appellees to furnish any of the proofs, certificate, bills, or specifications complained of, and it was the province of the jury to ⁸⁷ weigh the testimony and render a verdict accordingly; and no erroneous ruling of the court to the prejudice of appellant's substantial rights having occurred, the judgment of the court below must be affirmed.

INSURANCE — CONDITION REQUIRING MAGISTRATE'S CERTIFICATE OF LOSS.—Although a policy of insurance provides that the insured must furnish a certificate of a magistrate or notary as to his loss, if required to do so by the insurer, the insured is under no obligation to furnish such certificate unless required to do so: *Moyer v. Sun Ins. Co.*, 176 Pa. St. 579; 53 Am. St. Rep. 690. But compare note to this case showing that the production of such a certificate is a condition precedent to the right to sue.

INSURANCE—FAILURE TO DISCLOSE FACTS.—If an insured is not questioned respecting facts material to the risk, and does not intentionally conceal them, their existence does not invalidate the policy: *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155; 58 Am. St. Rep. 26; note to *Queen Ins. Co. v. Young*, 11 Am. St. Rep. 58.

INSURANCE—NOTICE TO AGENT AS NOTICE TO INSURER. Notice to an insurance agent, who issues a policy, of facts relating to the subject matter of the risk is notice to the company: *Rochester etc. Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note.

INSURANCE—PROOF OF LOSS—WAIVER.—Any disavowal, by an insurance company, of its liability to the insured avoids the necessity of furnishing proofs of loss as required by the policy: *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540; 64 Am. St. Rep. 700.

COMMONWEALTH v. DOUGLASS. DOUGLASS v. COMMONWEALTH.

[100 KENTUCKY, 116.]

LOTTERY PRIVILEGE — GRANT OF — LEGISLATIVE POWER TO REPEAL—IMPAIRING OBLIGATION OF CONTRACTS.—While a legislature may, in the exercise of its police power, grant a lottery privilege, the grant is only a privilege or license, not contractual, and a subsequent legislature may, in the interest of good order and morals, revoke the privilege thus granted

and repeal the grant, although pecuniary interests have been acquired under and by authority of the grant.

CONSTITUTIONAL LAW—CONSTRUCTION OF CLAUSE IN FEDERAL CONSTITUTION AS TO IMPAIRING OBLIGATION OF CONTRACTS.—The inhibition of the federal constitution against the passage of laws impairing the obligation of contracts relates to "property rights," and not to subjects purely "governmental," such as lottery franchises, though they have been paid for.

POLICE POWER—STATE CANNOT BARTER AWAY—LOTTERY PRIVILEGE.—The state cannot sell, barter, or contract its police power away. Hence, if the state grants a lottery privilege, which is an exercise of its police power, and then authorizes its sale, the purchaser takes the privilege subject to the right of the state to repeal it, for the state cannot sell or barter away its control of the subject.

JUDGMENT—RES JUDICATA—DECISION OF STATE COURT OVERRULED IN FEDERAL COURT.—If the highest court of a state decides that the purchase of a lottery franchise, by authority of the legislature, creates a contract that cannot, under the federal constitution, be revoked, but this decision is virtually overruled by the supreme court of the United States, the subject of the alleged contract right, when brought into question by subsequent litigation, is not *res judicata*.

William J. Hendrick, R. Reid Rogers, and Frank Parsons, for the commonwealth.

J. G. Carlisle, D. W. Sanders, Thomas H. Hines, Muir, Heyman & Muir, and Kohn, Baird & Speckert, for the appellee, Douglass.

¹²¹ **BENNETT, C. J.** These proceedings were commenced and prosecuted by the commonwealth to prevent the usurpation of the franchise claimed by Douglass to operate said lotteries. It seems that the legislature in 1850 authorized J. N. Webb to raise money by lottery for the benefit of the Henry Academy and Henry Female College.

The third section of the act empowered the grantees to sell the scheme, which they did, and which fell into the hands, by purchase, of the appellant Douglass, who proceeded to operate the same under said grant. He claims that the legislature having authorized the sale of the franchise, and he having become the purchaser thereof, his right to it became a vested right, which the legislature could not thereafter take away, because it would be impairment of the obligation of contracts which article 1, section 10, of the constitution of the United States expressly forbids. The lower court, upon the hearing of the case, decided that the grant had expired by limitation, and that decision must stand and is affirmed. In 1838, the legislature granted the privilege to certain gentlemen to raise money by lottery for the benefit of the city schools of Frankfort, and in 1872 the said act

was amended so as to allow the board of councilmen of the city of Frankfort to sell and convey the privileges granted for the purposes mentioned.

And the appellee, in 1875, purchased all the lottery franchises and privileges conferred by the act of 1838, and, also, the amendatory act of 1869.

The appellee, Douglass, contends that he was the ¹²³ purchaser of said franchise, and claims that, by reason of the act authorizing the sale of said lottery and the purchase thereof, he acquired a vested right which the legislature could not take away by its act of 1890 repealing said franchise, and relies upon article 1, section 10, of the federal constitution, which prohibits the states from passing any laws impairing the obligation of contracts as sustaining his contention and the decisions of this court thus construing his purchase.

This court, in the case of Gregory v. Trustees, 2 Met. (Ky.) 598, decided that a lottery grant might be repealed by a subsequent legislature, unless rights had been acquired and liabilities incurred upon the faith of the privileges conferred by the grant, in which case the rights thus acquired and liabilities incurred become contractual which the provision, *supra*, protected from repeal by subsequent legislation. The appellant contends that the grant of the lottery privilege by the state was an exercise of its police, not its contractual, power, which is inherently lodged in the state for the promotion and protection of its welfare and happiness, which the state cannot surrender and barter away, either as a gratuity or for pay. That while the legislature may, in the exercise of its police power, grant a lottery privilege, the grant is only a privilege or license, not contractual, and a subsequent legislature, in the interest of good order and morals, may revoke the privilege thus granted and repeal the grant, although pecuniary interests have been acquired under and by authority of the grant.

¹²³ It seems that this court, in Gregory v. Trustees, 2 Met. (Ky.) 598, decided expressly that where rights had been acquired and liabilities incurred upon the faith of the lottery grant, such rights and liabilities should be regarded as contracts which are protected by the federal constitution against impairment by the state legislature and which should be upheld, to the extent, at least, that the party has the right to enjoy the right thus acquired until he realizes his money thus invested out of the lottery business. The famous Dartmouth College case, and others that have followed it, is invoked to sustain this position. The other cases

upon the same subject, subsequently rendered by this court, repeat the same doctrine. But the supreme court of the United States, in *Stone v. Mississippi*, 101 U. S. 814, in construing the provision of the federal constitution that declares that the states shall pass no laws impairing the obligation of contracts, held that the inhibition related to "property rights," and not to matters that were "governmental." The court there held, in strong and emphatic language, that lotteries being a species of gambling, were vicious and demoralizing in the community, and that as it was the trust duty of the state government to protect and promote the public health and morals, it could not sell, barter, or give away that duty, and that the utmost power the legislature could exercise was to grant a license to carry on that species of gambling which only protected the licensee from the pains and penalties imposed upon that species of gambling, during the existence of the license, ¹²⁴ and that the legislature granting the license had no power to bind a subsequent legislature to its line of policy upon these subjects, and that a subsequent legislature might repeal the grant of the license, although it had been paid for.

It seems to us that this decision, defining the provision of the federal constitution as to what subjects are contracts and protected by it, and that lottery grants, although paid for, are not protected by said provision, is binding upon this court, and has the effect to overrule its decisions holding the contrary view.

But apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between the contractual and governmental power of the states, to wit, that the provision of the federal constitution in reference to contracts only inhibits the states from passing laws impairing the obligation of such contracts as relate to property rights, but not to subjects that are purely governmental. The reason for this distinction must be apparent to all, for, when we consider that honesty, morality, religion, and education are the main pillars of the state, and for the protection and promotion of which government was instituted among men, it at once strikes the mind that the government, through its agents, cannot throw off these trust duties by selling, bartering, or giving them away. The preservation of the trust is essential to the happiness and welfare of the beneficiaries, which the trustees have no power to sell or give away. If it be conceded that the state can ¹²⁵ give, sell, and barter any one of them, it follows that it can thus surrender its control of all and convert the state into dens of bawdy-

houses, gambling shops, and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the state of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals, and good order of the state would be cast to the winds, and vice and crime would triumph in their stead. Now it seems to us that the essential principles of self-preservation forbid that the commonwealth should possess a power so revolting, because destructive of the main pillars of government.

The power of the state to grant a license to carry on any species of gambling, with the privilege of revoking the same at any time, has an unwholesome effect upon the community and tends to make honest men revolt at the injustice of punishing others for engaging in like vices. We have, for instance, at this day, men confined in the state penitentiary for setting up and carrying on gambling shops whose tendencies are not much more demoralizing, if any, than the licensed lottery operator, who goes free under the protection of the law. The one wears a felon's garb, and the other is protected by license, which he claims as an irrevocable contract because he has paid for the privilege. The privilege ought never to be granted, and under the present constitution can never be. As said, to impress the privilege with the idea of contract because it was paid for might fill ¹²⁸ the whole state, and especially the cities, with gambling shops and enterprises, protected by contract, and the few gamblers that might not be thus protected and who would be liable to be punished for gambling, would not be, because it would strike the honest man as unjust to punish the poor wretch for doing that which was made lawful for others to do by paying for the privilege. As said, we are bound by the construction given to the provision of the federal constitution by the supreme court relating to the impairment of contracts by the states to the effect that the provision does not relate to lottery franchises, though paid for, and that the matter of such grants being strictly within the police power of the state, the state could not sell or barter away its control of the subject.

It is contended that the subject of the appellees' contract right is *res adjudicata* by this court. It is sufficient to say that the state had no constitutional right to contract its police power away; consequently, the appellee made his purchase of the franchise subject to the right of the state to repeal it, and the decision of this court that the appellees' purchase of the franchise

by the authority of the legislature created a contract that could not, under the federal constitution, be revoked, having been virtually overruled by the supreme court of the United States, destroys the contention of *res adjudicata*, and while the judge of the court below was loyal to this court in following the opinions heretofore rendered, we must affirm the judgment in the Henry county lottery case, and reverse his judgment as to the ¹²⁷ Frankfort lottery and remand the case for further proceedings in conformity with this opinion.

THE PRINCIPAL CASE WAS AFFIRMED, on writ of error, in *Dougllass v. Kentucky*, 168 U. S. 488. On December 31, 1875, one E. S. Stewart bought of the city of Frankfort the right to control and operate a lottery scheme in accordance with the provisions of the acts of Kentucky, under which the city proceeded. In 1890, the legislature repealed the charter of the Frankfort lottery, but Stewart had died before the passage of that act, and by contract with his wife, as sole legatee and devisee of his estate, the plaintiff in error, Douglass, acquired the right to operate the lottery scheme that had been acquired by Stewart. By reason of the act authorizing the sale of the lottery and the purchase thereof, Douglass claimed to have acquired a vested right which the legislature could not take away by its act of 1890. He relied upon that provision of the federal constitution prohibiting any state from passing a law impairing the obligation of contracts, and decisions of the supreme court of Kentucky, adjudging that the sale of a lottery franchise, under authority of the state, vested in the vendee a property right to conduct such lottery in accordance with the terms of his contract. Hence, with respect to matters involved in this action, he pleaded *res judicata*. By the constitution of Kentucky, of 1891, it is provided that: "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this act by proper penalties. All lottery privileges or charters heretofore granted are revoked." The federal question presented for the determination of the supreme court of the United States arose upon the claim of the plaintiff in error—which was denied by the final judgment of the highest court of Kentucky—that the agreement between the city of Frankfort and E. S. Stewart, by which the latter became the owner of the lottery scheme devised by that city, under the authority of law, was a contract the obligation of which the state was forbidden by the constitution of the United States to impair either by legislative enactment or by constitutional provision. "If this interpretation of the federal constitution be correct," said Mr. Justice Harlan, in delivering the opinion of the court, "it will follow that any provision in the constitution or in the statutes of Kentucky forbidding lotteries and gift enterprises in that commonwealth, and revoking the lottery privileges or charters theretofore granted, is null and void, as to the

defendant, Douglass, who succeeded to the rights acquired by Stewart under the agreement of 1875 with the city of Frankfort. This necessarily results from the declaration that the constitution of the United States is the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding."

"This court," said the learned justice, "had occasion, many years ago, to say that the common forms of gambling were comparatively innocuous when placed in contrast with the widespread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple: *Phalen v. Virginia*, 8 How. 163. Is a state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the legislature of a state contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lottery?" It was then shown that these questions arose and were determined in *Stone v. Mississippi*, 101 U. S. 814, 819, 821, affirming the judgment of the state court, which court held that no legislature can bargain away the public health or the public morals; that the right to suppress lotteries is governmental, to be exercised at all times by those in power, at their discretion, and that the state can withdraw a lottery privilege which it has previously granted. As said in *Stone v. Mississippi*, 101 U. S. 814, 821, and quoted in *Douglass v. Kentucky*, 168 U. S. 488, 497: "Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

It was then shown in *Douglass v. Kentucky*, 168 U. S. 488, 498, that the doctrines announced in *Stone v. Mississippi*, 101 U. S. 814, were not disturbed by the decision in *New Orleans v. Houston*, 119 U. S. 265, 275, holding that a grant in the constitution of a state of a privilege to a corporation is not subject to repeal or change by the legislature of the state. In other words, it was there decided that, while a lottery grant was not a contract within the meaning of the federal constitution, the obligation of which was protected against impairment by the state making the grant, the legislature could not strike down a lottery which the fundamental law of the state had authorized.

Mr. Justice Harlan then quoted at length from *Gregory v. Trustees of Shelby College*, 2 Met. 589, 598; and after showing that the supreme court of the United States possesses paramount au-

thority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the constitution, to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment: *Jefferson Branch Bank v. Skelly*, 1 Black. 436, 443; *Ohio Life Ins. Co. v. Debolt*, 16 How. 416, 452; *Wright v. Nagle*, 101 U. S. 791, 794; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg etc. R. R. v. Dennis*, 116 U. S. 665, 667; *New Orleans Waterworks Co. v. Louisiana Sugar Co.*, 125 U. S. 18, 36; *Bryan v. Board of Education*, 151 U. S. 639, 650; *Mobile etc. R. R. v. Tennessee*, 153 U. S. 486, 493; *Bacon v. Texas*, 163 U. S. 207, 219; he said: "In view of these adjudications, it is clear that we are not required to accept as authoritative in this case the decision of the court of appeals of Kentucky in *Gregory v. Trustees of Shelby College*, 2 Met. 589, above cited, to the effect that a legislative revocation of a lottery grant is a violation of the constitution of the United States so far as such revocation affects rights acquired on the faith of the privilege conferred by the grant, and the exercise of which involves the continuance of that privilege for such time as may be necessary for the full enjoyment of those rights. On the contrary, we hold that a lottery grant is not in any sense a contract within the meaning of the constitution of the United States, but is simply a gratuity and license, which the state, under its police powers, and for the protection of the public morals, may at any time revoke and forbid the further conduct of the lottery; and that no right acquired during the life of the grant on the faith of, or by, agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized. All rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the state to the extent just indicated; nevertheless, rights acquired under such a grant consistently with the law as it was when they were so acquired, and which rights may be exercised and enjoyed without conducting a lottery forbidden by the state, are, of course, not affected, and could not be affected, by the revocation of such grant. Here the defendant insists that, as the agreement under which Stewart became the owner of the Frankfort lottery scheme was lawful when made, he, as assignee of Stewart, is protected by the constitution of the United States in carrying on that lottery, despite the prohibition of all lottery grants by the present constitution of Kentucky adopted after the transfer to Stewart of the benefit of that scheme. For the reasons stated, this contention must be overruled. It could not be sustained without overruling *Stone v. Mississippi*, 101 U. S. 814, which we have no inclination to do."

Some stress was laid by counsel upon an adjudication by the court of appeals of Kentucky that the contract between the city of Frankfort and Stewart was a valid and binding contract, and that the state was consequently barred, upon the principle of res

judicata, from maintaining the present action; but it was held that: "A decision that the agreement between the city of Frankfort and Stewart was, when made, valid under the laws of Kentucky, did not determine, as between the state and those asserting rights under that agreement, that the state could not, by subsequent legislative enactment or by constitutional provision, and so far as the constitution of the United States was concerned, prohibit all lotteries, and thereby prevent the exercise, by those asserting the right, under or by virtue of that agreement, to carry on a lottery against the expressed will of the state."

POLICE POWER.—THE LEGISLATURE cannot divest itself of its police power. It cannot be parted with or impaired by contract: Note to Chicago etc. R. R. Co. v. State, 53 Am. St. Rep. 572.

LOTTERIES—GRANT OF PRIVILEGE TO CONDUCT—EFFECT OF.—A grant to private citizens, by the state legislature, of the right to carry on a lottery, is a mere privilege, and not a contract. Hence, a subsequent act repealing such grant does not impair the obligation of any contract: Bass v. Mayor, Meigs, 421; 33 Am. Dec. 154, showing that lotteries are contrary to public policy and good morals. The state may abrogate a lottery privilege: State v. Woodward, 89 Ind. 110; 46 Am. Rep. 160. A franchise to conduct a lottery is not a contract, and an amended state constitution prohibiting lotteries theretofore authorized does not impair the obligation of contracts: Mississippi Soc. v. Musgrove, 44 Miss. 820; 7 Am. Rep. 723; Moore v. State, 48 Miss. 147; 12 Am. Rep. 367.

RES JUDICATA.—THE DECISIONS OF A FEDERAL COURT sustaining a state statute is not res judicata and binding on a state court, when the same question subsequently arises under a similar statute. But it is only when required by the most cogent reasons, and compelled by unanswerable grounds, that the state court will declare the statute to be unconstitutional, when its constitutionality has been sustained by the supreme court of the United States: People v. Budd, 117 N. Y. 1; 15 Am. St. Rep. 460.

JACKSON v. COMMONWEALTH.

[100 KENTUCKY, 232.]

APPELLATE POWERS IN CRIMINAL CASES.—THE COURT OF APPEALS, OF KENTUCKY, IS NOT, IN A CRIMINAL CASE, authorized to examine the testimony, but is confined exclusively, to a review of errors of law appearing of record, and which affect the substantial rights of the accused.

HOMICIDE—INDICTMENT—WHEN SUFFICIENT.—It is permissible, in an indictment for murder, to charge, in the alternative, the different modes or means of committing the crime, though it would not be sufficient, in a joint indictment against two persons for murder, to charge, in the alternative, that one party or the other committed the crime.

HOMICIDE — INDICTMENT — ALLEGATION OF MODE AND MEANS OF DEATH.—Murder may be committed by cutting a person's throat, or by aiding and abetting another to do the cutting, and these two modes may be charged, in the alternative, in a joint indictment against two persons for committing the crime.

HOMICIDE—JOINT INDICTMENT—WHEN SUFFICIENT.

A joint indictment against two persons, Scott Jackson and Alonzo Walling, charging that they, "on the ——— day of ———, 1896, before the finding of this indictment, in the county aforesaid, did willfully, feloniously, and with malice aforethought, kill and murder Pearl Bryan by the one or the other, the said Scott Jackson or Alonzo Walling, with a knife or other sharp instrument, cutting the throat of the said Pearl Bryan, so that she did then and there die, the other being then and there present, aiding, and abetting the same, the exact manner whereof is unknown to the grand jurors, and which did the cutting, Scott Jackson or Alonzo Walling, or which aided and abetted the same, is unknown to the jurors." charges directly and certainly that Jackson did kill and murder Pearl Bryan, first by himself cutting her throat with a knife, or secondly by aiding and abetting Walling in doing so.

HOMICIDE—TRIAL—RELIEVING SHERIFF OF HIS DUTIES.—The refusal of the court, upon the separate trial of one of two defendants for murder, to relieve the sheriff of his duties in relation to the trial, and appoint another officer, upon the defendant's affidavit that the sheriff had taken an unusual interest in procuring a conviction, that he had denounced the defendants as the guilty parties, and that he had endeavored, by threats of punishment, to force them to confess the crime, is not ground for a reversal, where it does not appear that he had any personal feeling or bias against the defendants, or that there was a failure to execute any process placed in his hands by the defendant, or to perform any other duty, and especially where the record does not show that he, or any of his deputies, summoned any juror in the case.

HOMICIDE—PUBLIC TRIAL—TICKET SYSTEM OF ADMISSION TO COURTROOM.—Prior to the commencement of a trial for murder, the defendant filed an affidavit that the sheriff had announced his intention of permitting no one to enter the courtroom during the trial except members of the bar, court officers, and those holding tickets issued by himself, and moved the court to direct the sheriff to allow all well-behaved persons to attend the trial so long as they could be accommodated, but the court refused to act on the motion, and such refusal was held not to be error, where it appeared that the ticket system was carried on, and the tickets of admission issued to those who first applied for them, for the sole purpose of preventing an overcrowded courtroom; that this was done under the eye of the trial judge; and that no friend of the defendants, or any other person, who desired to do so, was prevented from attending the trial.

HOMICIDE—MYSTERIOUS MURDER—RANGE OF EVIDENCE.—If the true solution of a mysterious murder case rests largely upon circumstances affecting, or supposed to affect, the main transaction, the evidence should be allowed to take a wide range. There must, of course, be some connection between the fact to be proved and the circumstances in support of it; yet any fact which it is necessary to introduce to explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proved. Even evidence tending to prove a distinct crime is admissible, if it shows facilities or motives for the commission of the one in question.

HOMICIDE—EVIDENCE OF FOETUS—MOTIVE.—In a prosecution for the murder of a woman, evidence that the deceased was carrying a five months' foetus, which was probably alive up to the time of the woman's death, is competent as furnishing a mo-

tive for the killing, although no mention is made, in the indictment, of the murder of an unborn child.

HOMICIDE—EVIDENCE—CONVERSATION BETWEEN PARTIES CHARGED WITH CRIME.—If two persons, charged with murder, converse and make statements about the crime, in the presence of a third, the entire conversation is admissible in evidence, upon the subsequent separate trial of one of the parties, particularly where part of such conversation would be unintelligible without the whole of it.

HOMICIDE—EVIDENCE—USE AND EFFECTS OF COCAINE.—If it appears, on a trial for the murder of a woman, that cocaine was found in the stomach of the deceased, and that the accused had, previous to the death, inquired as to the effects of the drug on the system, the statement of a witness as to its use in producing abortions, and its effects upon the system, is admissible in evidence.

HOMICIDE—EVIDENCE—ACTS OF CODEFENDANT.—If one of two defendants jointly indicted for the crime of murder is separately tried, the various acts of the other party during the week preceding the commission of the crime, with which the accused on trial is shown to have been closely connected, are admissible in evidence.

HOMICIDE—EVIDENCE—CONVERSATIONS IN JAIL.—If two persons are jointly charged with murder, voluntary conversations between them, while confined in jail, are admissible in evidence upon the separate trial of one of them.

HOMICIDE—EVIDENCE—TESTIMONY OF ONE WHOSE DEPOSITION HAS BEEN TAKEN.—A witness, in a murder trial, whose deposition has been taken by the defense, and read in evidence, may be afterward introduced in person by the state.

HOMICIDE—INSTRUCTIONS.—Upon a trial for the murder of a girl, where the evidence tends to show that an attempt was made to kill her, by the administration of cocaine, while in a city of another state, and that this was done by the defendant, or at his instance, but that she was not thereby killed, it is proper to instruct the jury to find the defendant guilty of murder, if they believe from all the evidence, beyond a reasonable doubt, that the defendant willfully, feloniously, and with malice aforethought, himself attempted or aided, or abetted, or procured another to attempt, to kill the girl, but she was not thereby killed, and that the defendant in this county and state, before a certain date, though believing that the girl was then dead, for whatever purpose, cut her throat with a knife, or other sharp instrument, so that she did then and there, and because thereof, die.

HOMICIDE—INSTRUCTIONS.—Upon a trial for the murder of a girl, where it appears from the evidence that she was in a city of another state for the purpose of having an abortion performed, that her headless body was found in this state, that cocaine was found in her stomach, and that the defendant had made inquiries as to the effects of this drug on the system, it is proper to instruct the jury to find the accused guilty of murder, if they believe that he feloniously administered, or procured another to administer, drugs to the girl, for the purpose of producing an abortion, when she was so far gone with child as to make it necessarily dangerous to her life, or when the drugs were in themselves, or in the manner of their administration, dangerous to her life; and, though believing her to have been killed in this way, he cut her head off, in a designated county of this state, when she was in fact alive.

HOMICIDE—INSTRUCTIONS.—Upon a trial for the murder of a girl, where it appears from the evidence that she was in a city of another state for the purpose of having an abortion performed, that her headless body was found in this state, that cocaine was found in her stomach, and that the defendant had made inquiries as to the effects of this drug on the system, it is proper to instruct the jury to find the defendant guilty of manslaughter only if he cut the throat of the girl, in a designated county of this state, under the belief that she was already dead, and did so, not intending to kill her, but merely for the purpose of concealing her identity, unless he had theretofore himself attempted to kill her, or procured another to so attempt, or had administered drugs, or procured another to do so, for the purpose of procuring an abortion, in which event they should find him guilty of murder if the attempt was to kill her, or if the drugs were administered when dangerous to her life, but guilty only of manslaughter if the drugs were administered when not dangerous.

TRIAL—PROPER ARGUMENT.—HISTORICAL ALLU- SIONS, by counsel, during argument, to celebrated cases of circumstantial evidence, are not improper argument or ground for reversal.

HOMICIDE—MURDER ATTEMPTED IN ONE STATE AND COMPLETED IN ANOTHER.—An attempt to commit a murder in another state, supposed by the guilty party to have been there successful, but in reality completed in this state; though by an act not by him believed to be the consummation of his purpose, is punishable here. Otherwise stated, when a crime has been completed, the result of which is a death in this commonwealth, we can take jurisdiction of the offense.

HOMICIDE—MURDER—DECAPITATION—ATTEMPT TO KILL IN ANOTHER STATE—VARIANCE IN INSTRUCTIONS.—Under an indictment charging murder by cutting the throat or decapitation, the jury may, under proper instructions, consider a previous attempt to kill in another state, and by different means. There is no good reason why the motive which inspired the attempted crime in another sovereignty, and the circumstances of the attempt, should not be considered with a view of determining the character, criminal or not, of the ultimate fact which took place in this sovereignty.

HOMICIDE—MURDER.—CIRCUMSTANTIAL EVIDENCE considered and held sufficient to sustain a conviction for murder.

L. J. Crawford, for the appellant.

W. S. Taylor, and M. R. Lockhart, for the appellee.

245 HAZELRIGG, J. The appellant was jointly indicted with one Alonzo Walling in the Campbell circuit court for the murder of Pearl Bryan, and on his separate trial was found guilty and sentenced to be hanged.

It will be necessary to submit only a brief summary of the facts disclosed in the voluminous record before us to render intelligible the various complaints urged on this appeal against the judgment of conviction.

On the morning of Saturday, February 1, 1896, the headless body of a woman was found on the farm of one Locke, near

Newport, in Campbell county. Every effort to find the head proved futile, but the shoes the dead girl wore were marked, "Lewis & Hayes, Greencastle, Indiana," and this circumstance led to the identification of the body as that of Pearl Bryan, a young girl of that city. Her clothes were saturated with blood, particularly about the neck, and a large quantity of it was found on the ground near the neck, covering a circular spot some six or seven inches in diameter, and also a spot of similar kind some feet away. Extending ²⁴⁶ near to or over this last-named spot there were some privet bushes, the leaves of which were spattered with blood, and drops were discovered pending under the leaves, as though the blood had reached the under side of them by spurting from the neck, which it might do, as disclosed by the testimony, if the decapitation had taken place or been commenced at the spot near the bushes, and if the victim were alive at the time.

These and other circumstances led the authorities to proceed on the theory that the murder—for such it evidently appeared to be—occurred in Campbell county.

An autopsy disclosed that the girl was pregnant, and a healthy foetus, of some five months' development, was found, which, in the opinion of experts, was probably alive, until the death of the mother. The inquiries which led to the identification developed the fact that appellant, Scott Jackson, a dental student at the Ohio Medical College, but who formerly lived at Greencastle, was probably the author of the girl's ruin.

It was established beyond question that Pearl Bryan, after trying without success certain remedies prescribed by the appellant, left home on the Monday preceding her death, ostensibly to go to Indianapolis to visit friends, but in fact to come to Cincinnati in order that appellant might in some way procure relief for her, and it was shown that when she arrived in the city, where she was a stranger, she applied to him, or to him and Walling, the roommate and intimate associate of Jackson, for the purpose indicated.

On several days succeeding her arrival the three, ²⁴⁷ Jackson, Walling, and Pearl Bryan, were seen together in different parts of the city, though where she stayed during this time does not clearly appear.

By one witness, and by only one, does the commonwealth directly connect the appellant and his associate Walling with the girl at about the time she must have been murdered. This witness, a negro, George H. Jackson, testifies that at about 1 o'clock

on the night of Friday, the thirty-first (or rather the morning of February 1st), he was employed to drive, and did drive, a hack or cab from Cincinnati across to Newport, and out to a point near where the body was subsequently found, and was accompanied by Walling, who rode on the seat with him, and by appellant, who was in the interior of the vehicle with another person whom he could not see, but whom he took to be a woman in distress, et cetera.

This witness was discredited by proof seriously affecting his reputation for truth and veracity and by other circumstances, though it is fair to say that he appears to be corroborated in some material respects. To discard his testimony entirely is by no means to affect the state's case against the prisoner.

It is shown that on the Wednesday preceding the murder the accused bought some seventeen grains of cocaine, and an analysis of the girl's stomach discloses that cocaine had been administered to her. He is shown to have had possession after the girl's death of the valise belonging to her, on the inside of which were blood stains and in which were also found some strands of hair, believed to have come off her head, from its ²⁴⁸ color, et cetera, and also dirt or mud corresponding in microscopical appearance with that where the body was found.

On Jackson's pants, found, however, in Walling's locker, were found blood stains, and on the knee was also found some earth which, under the microscope and by chemical analysis, is found identical with the earth found at the point where the body was discovered. His coat is also found in the sewer, where he admits having thrown it, stained with blood. He is found in possession of her clothing, which he attempted to dispose of. He admits that he attempted to get rid of the valise by throwing it in the river, and by attempting to place it on an outgoing train.

There is produced and he admits writing a letter to his friend and associate, one Wood, in which he asks Wood to write in Pearl's name to her parents from Chicago, or elsewhere, saying she was tired of living at home and was at the place of writing, and concludes with these words: "Get the letter off without a second's delay, and burn this at once. Stick by your old chum, Bill, and I will help you out the same way, or some other way, sometime."

The theory of the defense is, and the accused so testified, that Wood was the author of the girl's misfortune, and sent her to Cincinnati, where he had made an arrangement to turn her over

to Walling, who was to perform, or had performed, an abortion. Appellant says that he last saw the girl at noon of Wednesday, and affects not to have inquired of Walling thereafter²⁴⁹ of the success or failure of the plan, or to have known anything of her whereabouts; that he knew nothing or suspected nothing wrong until, while at supper with Walling, on Saturday evening, he read a newspaper account of the finding of a headless body on the Locke farm, and at once had a presentiment that "this was Walling's case." He discovered from Walling's conduct on that occasion, and from what Walling confessed to him, that his suspicion was well founded.

He then became panic-stricken, and attributes to this mental condition his subsequent conduct in helping Walling to dispose of the dead girl's effects and in writing the damaging letter to Wood. All this he testifies was done at the instance of Walling, and while he was under Walling's influence and in the mental condition named.

This recital, without an elaboration of the proof, some of which is wholly at variance with the theory of the defense, serves to show that the facts in evidence conduced to establish the guilt of the accused, and further than this we are not authorized to examine the testimony, being confined exclusively, under the express language of the law, to a review of errors of law appearing of record, and then only when they are such as to affect the substantial rights of the accused.

By his demurrer and motion in arrest of judgment the appellant first raises the question of the sufficiency of the indictment. This instrument is as follows: "The grand jury of Campbell county, in the name and by the authority of the commonwealth of Kentucky, accuses²⁵⁰ Scott Jackson and Alonzo Walling of the crime of murder committed as follows, to wit: The said Scott Jackson and Alonzo Walling, on the ——— day of ———, 1896, before the finding of this indictment, in the county aforesaid, did willfully, feloniously, and with malice aforethought, kill and murder Pearl Bryan by the one or the other, the said Scott Jackson or Alonzo Walling, with a knife or other sharp instrument, cutting the throat of the said Pearl Bryan so that she did then and there die, the other being then and there present, aiding and abetting the same, the exact manner whereof is unknown to the grand jurors, and which did the cutting, Scott Jackson or Alonzo Walling, or which aided and abetted the same, is unknown to the jurors, against the peace and dignity of the commonwealth of Kentucky."

It is urged that this indictment is not direct and certain as regards the party charged, but charges in the alternative that one party or the other committed the offense, when it is permissible only to charge in the alternative the different modes or means of committing an offense.

The indictment, however, charges directly and certainly that Jackson did kill and murder Pearl Bryan, first by himself cutting her throat with a knife, or secondly by aiding and abetting Walling in doing so.

The cutting by himself is one mode, and the aiding and abetting Walling whilst he did the cutting is another mode of committing the murder, and these modes and means may be charged in the alternative.

²⁵¹ The indictment is sufficient, and its accuracy and conciseness of expression is to be commended.

Prior to the trial the appellant sought to prevent the sheriff of the county from performing his usual duties, and for that purpose filed his affidavit stating that that officer had taken an unusual and remarkable interest in bringing about a conviction of the accused, and had frequently denounced him and his co-defendant, Walling, as the guilty parties, and had devoted his whole time to hunting up evidence against them, and had endeavored by threats of punishment to force the defendants to confess to the crime. The court's refusal to relieve the sheriff furnishes another ground of complaint.

Unquestionably, if it should be shown in any case to the satisfaction of the court that a sheriff was a "party" or was "interested" in the proceeding (Civ. Code, sec. 667; Crim. Code, sec. 151), then another officer should be designated to execute the process, and so in criminal proceedings "the court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors": Crim. Code, sec. 193.

In this case it is not pretended that the sheriff had any personal feeling or bias against the prisoner, or was personally interested in the trial. While the "sufficient cause" named in the law is not defined, this court in *Forman v. Commonwealth*, 86 Ky. 605, said of a somewhat similar complaint that the unsupported affidavit of a defendant that the officer "was not a suitable person" and was "biased against him" and "would not summon ²⁵² impartial men to act as jurors" did not furnish sufficient cause for his removal.

It does not appear from the record here, and it was not intimated during the trial, that the sheriff or his deputies failed

to execute all process placed in their hands by the accused. As to the jury, it does not appear whether any member thereof was summoned by the sheriff or any of his deputies, and certainly there is no evidence in the record that he or they failed to perform properly any duty in this behalf.

In this connection, as it involves the conduct of the sheriff, we notice the complaint with respect to what is termed the ticket system of admission, adopted by the sheriff to control the attendance at the trial.

The affidavit of the accused, filed several days before the trial commenced, was to the effect that Sheriff Plummer "had announced his intention of permitting no one to enter the courtroom upon the trial herein excepting members of the bar, and court officials, who shall not hold a ticket of admission issued by him, and that such tickets should be good for only one-half of a daily session, and that no person shall receive tickets more than once; and that if said Plummer shall be permitted to carry out said program, friends of affiant, and all others who are not favorites of said Plummer, will be denied admission to the courtroom during the trial, and that affiant will thus be denied his right to an open and public trial, free from partiality and favoritism, et cetera."

Accompanying the paper was a motion that the court direct the sheriff "to permit any and all well-behaved ²⁵³ and respectable persons, who desire to attend the trial herein, to do so, so long as such persons can be conveniently accommodated in the courtroom, and to refrain from admitting some and excluding others, merely to gratify his own caprice and at his own pleasure, and to refrain from excluding any person for the sole reason that he may not hold a ticket of admission, et cetera."

Here is an effort to forestall the action of the sheriff, as well as a charge in advance that the sheriff would prostitute his office out of mere caprice or his own pleasure. The court properly refused to take any notice of the affidavit or motion.

It is significant that when the trial was over the accused was not able to say that any of his friends, or any other person who desired to attend, had been prevented from doing so, but contents himself with filing an affidavit that the ticket system had been carried out during the trial, and the admission of persons regulated thereby.

While much has been said in oral argument and by brief on this alleged error, there is not the slightest indication that the ticket system was carried on, and the tickets of admission issued

otherwise than to those who first applied for them, and for the sole purpose of preventing an overcrowding of the courtroom. This plan was carried on under the eye of the trial judge, and we quote his ruling on the point when discussing this ground for a new trial: "The fifth ground is stated to be error of law committed in refusing to permit defendant to have an open and public trial, 'free from favoritism ²⁵⁴ and partiality.' There is absolutely no foundation for such a statement. There is no suggestion made that there was the slightest discrimination in the admission of persons to the courtroom. The court, to enable it to transact business and as a protection to the defendant, directed the sheriff to have tickets of admission to the courtroom limited in numbers to the seating capacity of the room, and to give them in the order in which requests were made to him for them; that if strangers applied for them to satisfy himself they were not persons who might do violence to the defendant. The court has no knowledge that while the tickets were not exhausted any person was refused one. The ticket system prevented disorder in the corridors of the courthouse."

In the case of *People v. Murray*, 89 Mich. 276, 28 Am. St. Rep. 294, relied on by counsel for appellant, the order of the trial court to the police officer was to "stand at the door and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in whenever they should apply."

The supreme court (Michigan) said: "It is shown beyond question that during the whole trial the courtroom was not overcrowded, nor were the seats provided for spectators occupied to any great extent. This officer was under the control of the court, and when the court was informed that he was excluding citizens and taxpayers, he refused to take any notice of the complaint and left the officer to exercise his discretion as to what respectable citizens he should admit."

²⁵⁵ It is not pretended that any such exclusion or discrimination was practiced in this case. Had the court adopted the suggestion contained in the motion of appellant's counsel, and directed the officer to admit all "respectable persons," then the vigorous language of the case cited, denouncing the plan as violative of the constitutional right of "public trial," would have been applicable here; for, as indicated in that case, no citizen is required to present to a police or other officer a certificate of respectability before he is entitled to attend a public trial, as demanded by the constitution of his country.

Counsel next discusses the alleged errors of the court in admitting and excluding testimony. These are quite numerous, and, while all have been examined carefully, only the more important seem to demand special comment.

It is to be remembered in this connection that the true solution of this mysterious case rests largely, not upon direct testimony explaining the immediate transaction, but upon circumstances affecting or supposed to affect the main transaction; so that, as said by this court in *O'Brien v. Commonwealth*, 89 Ky. 362, "the evidence should be allowed to take a wide range, otherwise the guilty would often go unpunished. It is true there must be some connection between the fact to be proven and the circumstances offered in support of it; yet any fact which is necessary to introduce to explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the ²⁵⁶ commission of the crime, may be proven. Even evidence tending to prove a distinct offense is, therefore, admissible if it shows facilities or motives for the commission of the one in question. The purpose," says the court, "is to weave a net about the guilty, and often this can no more be done by proof of a single circumstance than the building of a house with a single brick."

This language is particularly applicable to the first complaint of counsel on this subject.

The autopsy held by the coroner developed that he found a healthy foetus, which must have been alive up to the time of the mother's death. This is claimed to be error, because no mention is made of the murder of an unborn child in the indictment. We think the existence of the foetus conduces to furnish a motive for the killing; its age would show the necessity for immediate action if relief was to be afforded or concealment made longer possible. Moreover, it appears that where death is caused by hemorrhage, there is less flow of blood in cases where the subject is pregnant, owing to the mysterious effort of nature to maintain the life of the foetus; and this question of the quantity of blood found about the body affects the very jurisdiction of the court trying the case, as upon it depends chiefly the solution of the question whether the decapitation occurred during life, and at the spot where the body was found.

Serious complaint is urged against the competency of Mayor Caldwell's testimony to the extent particularly that the witness gave any conversation between ²⁵⁷ Jackson and Walling after their arrest. The point of the objection can be understood the better by quoting from the bill of evidence.

"A. Mr. Jackson was asked about the satchel, and he said he had left the satchel at Mr. Legner's saloon across the street from where he roomed. When asked why he brought that satchel out, he said he wanted to loan it to a young doctor, whose name I do not remember, and he intended taking it to the college to give it to him, but he did not give it to him, and finally admitted that it was Pearl Bryan's satchel. Walling then repeated: I want to say in the mean time, in one of these conversations, we had told both these young men that they did not have to make any confessions to any person; that they were at perfect liberty to refuse to answer any and all questions that were asked them. Walling then stated in his presence that when Mr. Jackson came back from his holiday vacation he took him into the corner of his room on Ninth street, where they roomed, and told him that he was in trouble with Pearl Bryan, and that he intended to kill her. When asked how, he says: 'I propose to get a room, take her to the room, and give her some quick poison and leave her there.' Then again, he says, he changed, and said: 'No, I will cut her up into pieces and take the pieces and deposit them in different places about the city.' On this evening he said that he saw Pearl Bryan at the postoffice, and I believe that was Thursday evening instead of Wednesday evening. He ²⁵⁸ said that Jackson had made arrangements to take her over to Bellevue (I think it was) or over at the sandbar, or some place, and then kill her, take her head off, and bury her. He said that Jackson asked of the physicians as to the effects of the different kinds of poisons, and that he had a standard medical dictionary in his room, studying the effects of poisons, and that he asked one physician particularly as to the effects of cocaine, and he said that Jackson went to Sixth street to a pharmacist and got cocaine, and he brought it back and he said there was a level teaspoonful—a small teaspoonful as he described it; that he poured it out and dissolved it in two teaspoonfuls of water and put it in a bottle, as he said, to give her to paralyze her vocal organs or throat, and then cut her head off. Jackson turned to 'Wally,' as he called him at this time, and he says: 'Wally, why do you talk that way? You know you are not telling the truth; you know that you killed Pearl Bryan,' whereupon Walling says: 'No, you know that you killed her, and why don't you tell where her head is?' Then, when Jackson was asked where Pearl Bryan's head was, he says, 'I don't know; Wally says he threw it overboard.' Then he (Jackson) said that they took her clothes and made one or

two trips, I don't remember, to the river, and threw part of them over into the river and some into the sewers, but he could not tell where. Mr. Jackson then said that there was a bundle that he had given Walling; that Walling had a bundle, and asked him what he did with it. Walling says: 'That bundle is up in my locker at the college.' The bundle ²⁵⁹ was sent for and brought into their presence, and it was a pair of pantaloons which Jackson identified as his, but said that he hadn't seen them for some time; that Walling must have worn them, and thereupon I asked them then as to where the other clothes were, whereupon Walling says: 'Jackson, why don't you tell him where those things are; you might just as well do it now as any time?' Whereupon Jackson said that on the Saturday, I believe it was, that they were walking up Plum street with the bundles, that they met there some young physician or dental student coming toward them in an opposite direction, when they changed around and went down Plum and out Ninth. Jackson, as he said, went in Little Richmond street, and emerged from that, after the other man had passed, and came back down Plum to Ninth, from Ninth to Richmond, and out Richmond street westward, where he threw the bundle in one of the man-holes or sewers, but he could not state which. The sewers were drained or searched and the bundle brought to the department and Mr. Jackson identified it as his coat, first denying that it was his; said it was Walling's, but afterward admitted that it was his coat; but that Walling must have worn it. There were several conversations of this character, one time Walling accusing Jackson of killing the girl, then Jackson accusing Walling of killing her."

It is altogether clear that the statements of both Jackson and Walling were made voluntarily and are free from the suspicion of having been procured by promises or threats. It follows, therefore, indisputably, ²⁶⁰ that Jackson's statements are competent. These, however, without the corresponding portions of the conversation, as made up by Walling's statements, would be unintelligible. The whole must be taken in order to get the sense of it.

Here Walling discloses where a bundle is—a bloody coat—and it is found where he locates it. Jackson also tells where a bundle is—a pair of pantaloons, muddy and bloody—and the bundle is found where he locates it. There is no confession by either party, and no admission of any fact intended to be inculpatory. The conversation was voluntarily entered into by each party to it,

and we think the whole of it was competent; but on the following day the court said to the jury: "When upon yesterday I permitted Judge Caldwell to detail to you what Walling had stated concerning the conduct and statements of Jackson to him in Jackson's presence, it was done and admitted to you as testimony in this case for the sole purpose of your determining from what Jackson said, or his conduct at the time, in Judge Caldwell's presence, whether he admitted or denied the statements made by Walling, and you will determine, from all the testimony you hear in this case, whether or not Jackson, by his conduct, expressly or impliedly admitted or denied what Walling said."

We are not satisfied that it was proper to thus limit this testimony. On the contrary, it would seem that those portions of Walling's statements which Jackson did not deny, or, in other words, remained silent about, were the portions which were incompetent, if any were. ²⁶¹ This is true because Jackson was not called on, or it was not incumbent on him to speak at all. He had the right to remain silent when charged with the crime, and guilt is not to be imputed to him by reason of that silence.

As we have seen, however, he did not remain silent, but voluntarily entered into the conversation, denying every imputation of guilt. Later on the witness, Crim, was testifying to conversations between Jackson and Walling and the officers, and testified that Walling said that the Saturday before the arrest he met Jackson in Cincinnati with a Penny Post in his hand; that Jackson told him "they had something to work on; that if it were not for those damned shoes we would be all right"; and further said, that "I see the detectives have gone to Greencastle, and it looks damned blue." In response to this Jackson answered: "It is not true, and you know it is not true, Walling." Thereupon the court said to the jury: "You are to disregard every statement this witness has detailed that Walling made, which Jackson denied the truth of. I take this occasion now to charge you further that you will do the same as to all the testimony that Judge Caldwell gave as to what Walling said upon this same occasion, to which Jackson answered, 'Walling, you know you are not telling the truth.' All that testimony you will disregard, and will not consider it in coming to a conclusion in this case."

Still later in the trial, and after the defendant had testified minutely as to these conversations and his conduct and manner toward Walling, the witnesses, Caldwell, ²⁶² Crim, Deitsch, and others, were brought back in rebuttal, and were allowed to testify to the manner of Jackson's denial of Walling's statements,

the court saying: "The court now tells the jury that for the purpose of rebutting the testimony of Scott Jackson, and for that purpose only, the jury will consider statements made by Chief Deitsch, Mayor Caldwell, Cal Crim, McDermott, Julius Plummer, and Mr. Pooch, in reference to conversations that they detailed between Walling and Jackson, in the presence of Chief Deitsch and Mayor Caldwell, in reference to what Jackson had said to Walling when in Jackson's room and Jackson's denial of it"; and finally, in a written instruction (No. 13), the court told the jury that "all the evidence offered by the commonwealth as to any statement of Alonzo Walling, the truth of which the defendant, Scott Jackson, denied, and, as to the manner and language of the denial, are to be considered by them solely in rebutting the defendant's testimony thereto—that is, to contradict, weaken, or explain Scott Jackson's statements in reference thereto, and not as testimony upon which to find him guilty. The defendant's own statements of what Alonzo Walling said, and the language and manner of his denial, are before the jury for every purpose."

As in all the conversations Jackson did in fact deny the truth of every charge looking to his guilt made by Walling, the effect of the court's ruling was to exclude from the jury all that Walling said to Jackson's detriment, except as affecting his own statements on the stand with respect thereto. This, we have seen, was ²⁶³ more favorable to him than he had the right to demand.

We are of the opinion, further, in view of the fact that cocaine was found in the stomach of the dead girl, and that the accused had inquired into its effects, that the witness, Cullen, was properly allowed to state the use of this drug in the production of abortion and its effects on the system.

It is insisted that the witness, Pooch, was allowed to testify what Jackson said in his presence after his arrest without it being first shown the circumstances surrounding the statement were proper. It is clear, however, that in no case was any statement of the accused admitted without a full opportunity for a preliminary examination and until the court was satisfied that the statement was voluntarily made.

Complaint is also made that questions intimating other acts of doubtful propriety on the part of Jackson, and touching matters wholly foreign to the trial, were allowed to be asked. Objection to these, however, was sustained and counsel cautioned not to indulge in such conduct further.

We think, too, that the various acts of Walling during the week preceding the death of the girl and after her arrival in Cincinnati were properly shown by the proof of Rogers, Martin, Skidmore, and others. These acts were "single bricks in the building," and Jackson was shown to have been closely connected with them. So, too, we think competent the conversation between Jackson and Walling when confined in the "sensitive" cell. The talk was wholly voluntary. Nor do we ²⁶⁴ think incompetent the testimony of the negro witnesses who were introduced in person by the state after their depositions, taken for the defense, had been read. The jury heard each statement.

Many other rulings of the court touching the admission and rejection of testimony are complained of, but the decision of the court in each case is easily sustained on principles already announced. The instructions of the court have been examined carefully and need no extended comment. The first is on the theory that Jackson did the cutting and killing; the second that Walling did this, and that Jackson aided and abetted him; the third we quote in full: "If the jury believe from all the evidence beyond a reasonable doubt that the defendant, Scott Jackson, willfully, feloniously, and with malice aforethought, himself attempted or aided or abetted or procured another to attempt to kill Pearl Bryan, but she was not thereby killed, and that said Scott Jackson, in this county and state, before the fourteenth day of February, 1896, though believing said Pearl Bryan was then dead, for whatever purpose, cut her throat with a knife or other sharp instrument so that she did then and there, and because thereof, die, they will find said Scott Jackson guilty of murder."

The conclusion is fairly deducible from certain portions of the testimony that an attempt was made to kill the girl by the administration of cocaine while in Cincinnati, and that this was done by the defendant or at his instance, but that she was not thereby killed. It is to be remembered that, according to the testimony of ²⁶⁵ Jackson, he did not see the girl in life after Wednesday, and, according to Walling, he did not see her after that day; but the proof conduces to show that they were both with her Friday night when she was in the cab, and that they brought her over to Campbell county.

If she was then dead, as might be supposed from her making no outcry, a verdict of guilty could not have been rendered; but if she was then alive, though appearing to be dead, and by the cutting of her throat she was killed while in Campbell county,

then the jury might find a verdict of guilty, although the cutting off of the head was merely for the purpose of destroying the chances for identification or for any other purpose. At last, the instruction does not authorize a verdict of conviction unless Jackson is shown to have cut off the head of his victim in Campbell county—and whilst she was in fact alive—and if he did this, he was guilty of murder, though believing her already dead, if the act succeeded, and was but a part of the felonious attempt to kill her in Cincinnati.

Some of the facts on which this instruction is based do not appear as distinctly in proof as others, but there is some basis for the hypothesis put, and the whole arises out of the circumstances in evidence.

The fourth is the same instruction, with Jackson as an abettor and Walling as principal.

The fifth is based on the theory that Jackson feloniously administered, or procured another to administer, drugs to Pearl Bryan, for the purpose of producing an abortion, when she was so far gone with child as to ²⁰⁰ make it necessarily dangerous to her life, or when the drugs were in themselves, or in the manner of their administration, dangerous to her life; and, though believing her to have been killed in this way, he cut her head off in Campbell county when she was in fact alive, yet he was guilty of murder.

The sixth is identical with the fifth, save that appellant is treated as an abettor and Walling as principal.

Keeping in mind the purpose for which, as appears from the proof, the girl was brought to Cincinnati, the fact that cocaine was found in her stomach and the defendants' inquiries with respect thereto, we think these instructions fairly suggested by the proof and embody correct principles of law.

The seventh and eighth are with reference to voluntary manslaughter, and are not seriously objected to.

The ninth also authorizes a verdict of voluntary manslaughter, and is fashioned after the fifth, with the exception of the words "she not being then so far gone with child as to make the same necessarily dangerous, et cetera," and the tenth is like the sixth, with the exception of the above words. Our disposition of the fifth and sixth, therefore, disposes of the ninth and tenth.

The eleventh was on the subject of involuntary manslaughter, and authorized such a finding if Jackson cut the throat of Pearl Bryan in Campbell county, under the belief that she was already dead, and did so, not intending to kill her, but merely for the

purpose of concealing her identity, unless he had theretofore himself attempted to kill her, or procured another to ²⁶⁷ so attempt, or had administered drugs, or procured another to do so, for the purpose of producing an abortion, in which event they were to "find as elsewhere instructed"; meaning, it is evident, that if the attempt was to kill her, or if the drugs were administered when dangerous to her life, he was still guilty of murder, as theretofore defined, or of voluntary manslaughter, if the drugs were administered when not dangerous.

The twelfth is the same, except that the accused is treated as an abettor and Walling as principal.

The thirteenth, we have already seen, is a limitation on the scope of certain testimony, and is unobjectionable.

The succeeding instructions are the usual ones on reasonable doubt, presumption of innocence, et cetera, and substantially embrace those asked for by appellant on these subjects.

Complaint is made that counsel for the state referred in his argument to the state of public sentiment in the case, but what was said on this subject was wholly in response to statements of counsel for the defense on the same subject, and was presently stopped by the court.

The references to the Webster-Parkman case and to the Durant case were merely historical allusions to celebrated cases of circumstantial evidence, and cannot be said to have been an improper argument or furnish ground for reversal.

Upon the whole case we are convinced that the accused has had a fair and impartial trial. If upon his arrest and when first confronted with the charge of having ²⁶⁸ committed so horrid a crime he was so disconcerted—as he might naturally be even if ever so innocent—as to tell an incoherent and contradictory story of his connection with it, yet when time had been given to come to himself he seems not to have availed himself of the opportunity to tell a story at all compatible with that of an innocent man, or even of one who had committed a grave error by inadvertence, ignorance, or mistake.

The explanation of his damaging letter to Wood, his claim of utter ignorance of the whereabouts of Pearl Bryan after Wednesday, and his claim of failure to even inquire where she was or what success had attended the plan for her relief, his reasons for disposing of the satchel and other effects of the dead girl, are all improbable stories, and it is not to be wondered at that the jury could not accept his statements as true.

The judgment must be affirmed.

ON REHEARING.

THE COURT.—With great earnestness, force, and plausibility two contentions are made by the petitions for rehearing in this case and in the case of Walling v. Commonwealth: 1. That no facts which occurred in the foreign jurisdiction of Ohio can be tacked onto facts which occurred in Kentucky for the purpose of supplying the elements necessary to constitute the crime of murder in Kentucky; 2. (And this appears to be the point chiefly relied on) That in giving its instructions to the jury the trial court is not authorized to refer to any fact which occurred ²⁶⁰ in the foreign jurisdiction. Other suggestions are made in the petitions, but in our judgment do not require specific response.

These two contentions may be considered together, as the first is necessarily raised and considered in the decision of the second, and so treated in the petition.

Reduced to its lowest terms, the claim of counsel is that an attempt to commit a murder in another state, supposed by the guilty party to have been there successful, but in reality completed in this state, though by an act not by him believed to be the consummation of his purpose, is not in this state punishable.

Such is not nor should it be the law. By the law of this state a crime is punishable in the jurisdiction in which it has effect. Statutes in numbers have been passed by the general assembly of this commonwealth providing that jurisdiction should be had of crimes in the county in which the crime became effectual: Ky. Stats. c. 36, art. 2. Such we believe to have been the common law before such enactments.

Assuming that what the jury found was true, in what state or district could the crime be punished? If not here, where? If we concede the claims of counsel for appellants, no serious crime was committed in Ohio. Nothing was there done but an ineffective attempt to murder. None was committed here. What was done in this jurisdiction was only the mutilation of a supposed corpse, and yet the fact, established by overwhelming testimony, remains that the crime has been ²⁷⁰ committed. Not all the refinements of counsel can lead us from the conclusion that, when a crime has been completed the result of which is a death in this commonwealth, we can take jurisdiction of the offense.

Not for a moment can we admit as law the logical conclusion of counsel's argument, namely, that there is a variety of murder, which, by reason of error in its commission, is not anywhere

in any jurisdiction punishable; not in Ohio, for the reason that the attempt there made was not successful; not in Kentucky, for the reason that the act there done, and which accomplished and completed the actual killing, was done upon the supposition that the murder had already been accomplished.

One reliance of the defense upon petition for rehearing is, that the indictment charges murder by cutting the throat or decapitation, and that the instructions permit and require the jury to consider a previous attempt to kill in a foreign state and by different means. But in our opinion it was not error in the instructions to present to the jury evidential facts which, if found to be true, showed the criminal nature of the act by which the offense was completed.

We see no good reason why we should not consider the motive which inspired an attempted crime in another sovereignty, and the circumstances of the attempt, with the view to determine the character, criminal or not, of the ultimate fact which took place in this sovereignty; nor is such a determination an invasion of the constitutional right of the accused to a speedy "public trial by an impartial jury of the vicinage." ²⁷¹ For the accused himself selected the vicinage in which the final act occurred, and thus himself gave jurisdiction to the court which determined the criminal character of that act. Nor can we consider as serious the contention that the ruling of the trial court, approved by the opinion in this case, is punishment in Kentucky of an offense committed in another jurisdiction, and there again punishable, so as to come within the constitutional inhibition against a citizen being twice put in jeopardy. On counsel's own contention no completed crime existed in Ohio, and the crime committed, if punishable under this state's law, cannot further or again be punished there.

The objections made to the ticket system of admission to the courtroom during the trial are also insisted on in the petition for rehearing. It is objected that it was impossible for any friend of the appellant being present during the trial, and that, therefore, the appellant was denied an open public trial; but it has not been attempted to be shown that any friend of the appellant in either case was excluded from the courtroom.

With regard to the objections to the accusatory statements of Walling, made in the presence of Mayor Caldwell, we need only say that they were excluded from the consideration of the jury, except in so far as they tended to contradict, weaken, or explain Jackson's own statement in regard to the same conversation.

We have carefully examined the immense mass of testimony in the case, and see no error to the prejudice of any substantial right of the appellant.

The petition for rehearing is overruled.

HOMICIDE—INDICTMENT.—The general subject of the certainty required in an indictment for murder is treated in a monographic note to *Schaffer v. State*, 3 Am. St. Rep. 279-284.

CRIMINAL LAW—PLACE WHERE CRIME IS COMMITTED.—A criminal act begun in one state and completed in another renders the person who does the act liable to indictment in the latter state: *Simpson v. State*, 92 Ga. 41; 44 Am. St. Rep. 75; see monographic note to this case on the place where crime is committed; and see *State v. Hall*, 114 N. C. 909, 41 Am. St. Rep. 822, showing the jurisdiction to punish acts done partly in different states.

CRIMINAL LAW.—EVIDENCE OF OTHER CRIMES is sometimes admissible to show motive: *People v. Seaman*, 107 Mich. 348 357; 61 Am. St. Rep. 326, 333. If such other offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove the former: Note to *Fowle v. Child*, 49 Am. St. Rep. 454.

HOMICIDE—EVIDENCE.—On a trial for murder, anything that will throw light on the homicide, and everything that might have influenced the mind of the defendant, may be shown in evidence: *State v. Reed*, 53 Kan. 767; 42 Am. St. Rep. 322. In cases of circumstantial evidence, every fact material, relevant, and within the issues, from which the jury may legitimately deduce the guilt or innocence of the accused, should be submitted to them, and although the relevancy of any fact when standing alone may not be apparent, yet, when taken in connection with any other fact, or all the other facts, properly admitted, its relevancy is made to appear. It should go to the jury: *Jenkins v. State*, 35 Fla. 737; 48 Am. St. Rep. 267.

CRIMINAL LAW—EVIDENCE—CONVERSATIONS.—If part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other party: *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 894.

TRIAL—CRIMINAL PROSECUTIONS—PUBLICITY.—The requirement of a "public trial" is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, for, while the accused has the right to a public trial, the court has the power, in proper cases, to put a reasonable limit to the number of persons that may be admitted to the courtroom during the trial: See extended note to *People v. Murray*, 28 Am. St. Rep. 308, 309, on the right to, and what are infringements upon, a public trial.

WINCHESTER & LEXINGTON TURNPIKE COMPANY v. WICKLIFFE.

[100 KENTUCKY, 531.]

CORPORATIONS.—A SUIT FOR DIVIDENDS declared by a corporation cannot be maintained until a demand is made.

CORPORATIONS.—A RIGHT OF ACTION FOR DIVIDENDS declared by a corporation accrues when each dividend is declared.

LIMITATIONS OF ACTIONS—EXTENDING TIME BY NEGLECTING TO MAKE DEMAND.—A creditor cannot, by neglecting to make a demand, extend the time allowed by law in which to sue his debtor.

LIMITATIONS OF ACTIONS—CAUSE OF ACTION ACCRUES. WHEN.—The statute of limitations does not begin to run until the cause of action accrues; but this means that, whenever it is in the power of the creditor to enforce the payment of his demand, his cause of action has accrued, although he may, by law, be required to make a demand before he involves the debtor in a bill of costs.

LIMITATIONS OF ACTIONS—WHEN THE STATUTE BEGINS TO RUN.—The statute of limitations begins to run from the time that the debtor is subject to be sued, or from the time that the creditor can, by his own act, or of his own volition, become entitled to maintain an action.

LIMITATIONS OF ACTIONS—DIVIDENDS DECLARED BY A CORPORATION—FIFTEEN YEARS.—An action upon a contract or obligation in writing is not, under the statute of Kentucky, barred until fifteen years from the time the cause of action accrued. Hence, an action upon a declaration of dividends by a corporation, it being part of the records of the company, when signed by the proper officer, and, therefore, an obligation in writing for the payment of money, is not barred, under that statute, until fifteen years from the time the cause of action accrued.

Breckinridge & Shelby, for the appellant.

Samuel M. Wilson, and Morton & Darnall, for the appellee.

⁵³² GUFFY, J. This action was instituted by the administrator of Robert Wickliffe against the appellant to recover two hundred and thirty-two dollars and fifty cents, dividends due from the appellant upon the shares of stock owned and held by the decedent in the Lexington & Winchester Turnpike Company, which dividends accrued and were declared upon the shares so held, commencing with the year 1877 and ending in 1889. The appellant pleaded and relied on the statute of limitations as its only defense, relying on the five ⁵³³ years and also on the ten years' statute of limitations, and alleging that the dividends had been appropriated by the appellant to its own use more than five years as to part, and more than ten years as to the residue. This suit was filed October 16, 1894. The court below sustained a demurrer to the answer, and, appellant declining to amend, judgment was rendered in favor of appellee for the amount claimed; and from that judgment appellant prosecutes this appeal.

The only question presented for decision is, whether or not the claim, or any part of it, was barred by limitation.

Appellant insists that the case of Mercer County Court v. Springfield etc. Tp. Co., 10 Bush, 254, is decisive of this case,

and determines that the five years' statute bars a claim for the dividends declared. It is true that the court held that the dividends in that case were barred by the five year statute, but that case is unlike the case at bar. It will be seen, upon examination of the opinion in that case, that the company denied the right of the county to the shares of stock, and, of course, it had never declared any dividends as due to the county court; but in the case at bar it is admitted, in effect, that the dividends had been declared in appellee's favor, and that if he had applied in time would have been entitled to the payment thereof.

Appellee's contention is, that no right of action accrued to appellee until a demand for payment was made by him of the appellant; and as no demand had ⁵³⁴ been made until a few days before suit, the statute had not commenced to run prior thereto; also that the appellant held the dividends as trustee for appellee, and, therefore, the statute constituted no bar to a recovery, and cites *Bank of Louisville v. Gray*, 84 Ky. 575, in which the court said: "A bank is a trustee for its stockholder," and further announced the doctrine that the bank should not be regarded as holding the dividends of its stockholders adversely until after a demand is made. Appellant insists that so much of the opinion as is relied on by appellee was not necessary to a decision of that case, hence is only obiter dicta and not authority; but it is not necessary to pass upon that question, for the reason that in no event can that decision be decisive of this case.

A bank is in many respects different from a turnpike company, and the reasons for holding it to be a trustee for its stockholders might be much stronger than any reason for so holding in regard to a turnpike company. It is part of the business of a bank to receive and hold the money of its patrons payable on demand.

It is said in *Beach on Private Corporations*, volume 2, section 599, page 953: "A dividend declared operates as a specific appropriation of a part of the property of the company to its payment, and the claims of the shareholders as creditors develop into an absolute title to the property so appropriated. Accordingly, after the declaration of the dividend, the profits are considered as separated from the corporate ⁵³⁵ property, and payable on demand to the individual stockholders as a debt due absolutely to them."

It is said, in *Thompson on Corporations*, volume 2, section 2232, that unless there is a statute dispensing with a demand, in actions for the recovery of money, a stockholder must prove a

demand before he can maintain an action for a dividend. The same author says, in section 2229, that "dividends declared on the capital stock of a corporation, and payable on demand, are not subject to the running of prescription or limitation until there has been a demand and refusal"; and refers to *State v. Baltimore etc. R. R. Co.*, 6 Gill, 363; *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128, and other decisions.

The first-named case does not fully sustain the learned author, but the latter case seems to do so. It may, however, be conceded that a demand for payment of dividends declared in favor of stockholders must be made before suit can be maintained to recover them. The diversity of the statutes of limitation in the various states results sometimes in an apparent conflict of decisions of different courts of last resort. The question presented in this case must be governed by the statute of limitation of this state. Section 2514 of the Kentucky Statutes (which is but a re-enactment of former statutes) provides: "That civil actions, other than those for real property, shall be commenced within the following periods after the cause of action has accrued. . . . An action or suit upon a recognizance, bond or written contract, . . . or upon a bond or obligation for the payment ⁵³⁶ of money or property, or for the performance of any undertaking, shall be commenced within fifteen years after the cause of action first accrued."

It seems clear to us that appellee's cause of action accrued when each dividend was declared. It is true that before he could maintain a suit he must make a demand. Our statutes require that the creditor of a decedent must make a demand of the administrator, accompanied with a proper affidavit, before he can maintain suit. Yet I presume that it would not be contended that the creditor could, by neglecting to make the demand, extend the time allowed by law in which to sue the debtor, if alive, or the administrator. It often happens that a party dies leaving notes not then due, and upon which no right to sue has accrued. Would it be contended that the creditor could neglect to make the proper demand of the administrator, and thus extend the time in which he might sue beyond the time mentioned in the statute as to limitation of actions? The statute of limitation begins to run from the time that the debtor is subject to be sued, or from the time that the creditor can, by his own act or of his own volition, become entitled to maintain an action. It is clear that the statute does not begin to run until

the cause of action accrues; but the meaning of that is, that whenever it is in the power of the creditor to enforce the payment of his demand, his cause of action has accrued, although he may be by law required to make a demand before he involves the debtor in a bill of costs. It may be said that the statute ⁵³⁷ of limitation is a statute of repose, and should be so construed and enforced as to accomplish that object. It will be seen from the statute that an action upon a contract or obligation in writing is not barred until fifteen years from the time the cause of action accrued. The contract or obligation in this case was in writing, being part of the records of the company, signed by the proper officer—at least should have been so entered and signed; in fact, it is in law bound to be, and is so admitted in the pleading, not being denied. The appellee was, therefore, entitled to judgment for all the dividends that had been declared within fifteen years before the sixteenth of October, 1894 (the time of the institution of the suit).

It results from the foregoing that the court below erred in sustaining the demurrer to the entire answer. It should have been overruled as to the claim for dividends declared in 1877 and 1878, and sustained as to the residue of the answer.

The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

CORPORATIONS—DIVIDENDS—SUIT FOR—STATUTE OF LIMITATIONS.—Dividends belong to the owner of the stock at the time they are declared, and suit therefor may be brought against the corporation if it does not pay on demand: *Ford v. Easthampton etc. Thread Co.*, 158 Mass. 84; 35 Am. St. Rep. 462, and note, but a demand is necessary before suit brought: Note to *Goodwin v. Hardy*, 99 Am. Dec. 764.

LIMITATIONS OF ACTIONS—DIVIDENDS OF CORPORATION.—The statute of limitations begins to run when the cause of action accrues: *Fee v. Fee*, 10 Ohio. 469; 36 Am. Dec. 103; *Robinson v. Pittsburgh etc. R. R. Co.*, 32 Pa. St. 334; 72 Am. Dec. 792. It does not begin to run against an action for a dividend declared by a corporation until demand is made: Note to *Goodwin v. Hardy*, 99 Am. Dec. 764; or until notice that the stockholder's right to it is denied: *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329; 70 Am. Dec. 128. Though a demand is necessary to give a right of action, the general rule is, that such demand must be made within the period prescribed by the statute of limitations: *Landis v. Saxton*, 105 Mo. 486; 24 Am. St. Rep. 403.

WESTERN UNION TELEGRAPH CO. v. EUBANKS.

[100 KENTUCKY, 591.]

TELEGRAPH COMPANIES—DELAYED MESSAGE—DAMAGES.—If there is delay in delivering a telegraph message to ship a load of mules on a certain day, and it is shown that the mules could, and would, have been shipped on that day, if the message had been delivered within a reasonable time after it reached the place of destination, the addressee may recover damages for loss sustained in not shipping the mules on that day, as such damages are not, in a legal sense, remote or speculative.

TELEGRAPH COMPANIES—VALIDITY OF STIPULATION AS TO REPEATING MESSAGES.—A printed stipulation upon the back of a blank, used for sending a telegraph message, that the telegraph company shall not be answerable for mistakes or delays unless the message is repeated, is invalid, because it is a contract which seeks to limit or restrict the company's liability for negligence.

TELEGRAPH COMPANIES—VALIDITY OF STIPULATION LIMITING TIME FOR PRESENTING CLAIMS FOR DAMAGES. A printed stipulation upon the back of a blank used for sending a telegraph message, that the company shall not be answerable for damages if the claim therefor is not presented in writing within sixty days after the message is filed with the company for transmission, is unreasonable, contrary to public policy, and violative of the constitution, not only as an attempt to vary the statute of limitations, but as a contract limiting the common-law liability of carriers.

TELEGRAPH COMPANIES ARE TO BE TREATED AS COMMON CARRIERS, and are, therefore, bound by a constitutional provision that no common carrier shall be permitted to contract for relief against its common-law liability.

CONSTITUTIONAL LAW—RELIEF FROM COMMON-LAW LIABILITY—INTERSTATE COMMERCE.—The provision of the Kentucky constitution that no common carrier shall be permitted to contract for relief against its common-law liability does not conflict with the interstate commerce clause of that constitution.

TELEGRAPH COMPANIES—STIPULATIONS AS TO CIPHER MESSAGES.—Public policy forbids that a telegraph company should, by any contract, exempt itself from damages resulting from its negligence in transmitting cipher or obscure messages.

TELEGRAPH COMPANIES—CONTRACT AGAINST NEGLIGENCE.—If a telegraph company causes injury by its neglect in transmitting a message, no contract or agreement between it and the sender will bar a recovery.

CONTRACTS.—THE LAW OF THE PLACE where a contract is to be performed governs, subject to the rule that a contract, void by the law of the place where made, is void everywhere.

A. S. Walker, George Harris, George H. Fearons, Richards, Weissinger & Baskins, and Richards, Baskins & Ronald, for the appellant.

Goodnight & Roark, and Sims & Covington, for the appellees.

GUFFY, J. It is substantially alleged in the petition in his action that appellees were partners in the livestock business

and that appellant was a common carrier of messages and telegrams. That on the twenty-first of December, 1893, plaintiff's agent, H. P. Russell, at Atlanta, Georgia, delivered to defendant to be transmitted to plaintiff at Franklin, Kentucky, the following telegram or message, viz.:

"Atlanta, Ga., Dec. 21, 1893.

"J. W. Russell, Franklin, Ky.

"Ship to-day eighty-five dollar load; will make money; feeling good.

"H. P. RUSSELL"

595 for which message defendant received pay and undertook and agreed to transmit same to plaintiff at Franklin, Kentucky. That the same was received by defendant at Atlanta in ample time to be transmitted to plaintiff—in ample time for them to have shipped the carload of mules on that day to Atlanta, but said message or telegram was not delivered to plaintiff until too late to ship said mules. That it was not delivered to plaintiff until after dark, about 7 o'clock, when it could have been delivered early in the morning on said day and it could easily have been delivered in time for plaintiff to have shipped said carload of mules on that day; but defendant, through the negligence and incompetency of its agents, employes, and operators then in its employment and in charge of and operating its line and business, failed to deliver said message until 7 o'clock and after dark of said day. The said failure to deliver the message in time was caused alone by the negligence and incompetency of defendant's agents and employes.

That if they had received said telegram at the time it should have been delivered, they could and would have shipped said carload of mules, twenty-five in number, to Atlanta, Georgia, and said mules would have arrived in Atlanta, Georgia, at a time when the market was high and good; that they could and would have sold said carload of mules, if same had been shipped on the day telegraphed for, for two hundred and fifty dollars more than they could and did sell them for when shipped later. That if said mules had been shipped on December 21st, they would 590 have arrived in Atlanta on December 23, 1893, when the market was good and when they could and would have sold said mules for a good price; but by the negligence of defendant's agents and employes they were thus prevented from shipping and said mules did not get to Atlanta till the following Tuesday, when the market had declined.

That they have been damaged by defendant's negligence in

the sum of two hundred and fifty dollars, for which sum judgment was prayed.

The first paragraph of the answer may be taken as a denial of all the averments contained in the petition, including a denial of the charge that appellant was a common carrier, but does not deny that it is a corporation engaged in transmitting messages and that it can sue and be sued.

It is averred in the second paragraph that appellant received of H. P. Russell individually, not as agent for plaintiff, at one o'clock and five minutes, December 21, 1893, the message heretofore copied, except the word "the" before "eighty," and files the original message marked "A." It is further averred that in receiving and transmitting messages with the best of operators and under the most favorable circumstance there is always some liability and probability of mistake, and especially, as in this case, when the message had to be transmitted several hundred miles and through relay offices. That mistakes and delays are inseparable from the nature of the business. That H. P. Russell, when he delivered the said message to defendant to be sent ⁵⁰⁷ as aforesaid, requested defendant to send said message subject to the terms on the back thereof, which he then agreed to, and he was directed on the face of said message to "read the notice and agreement on the back," which notice and agreement solemnly signed and made by him is in the following words, viz.:

"All messages taken by this company are subject to the following terms:

"To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeated message beyond the amount received for sending the same; nor for any mistake or delay in the transmission or delivery or for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruptions in the working of its lines, or for errors in cipher or obscure messages; . . . and this company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company when necessary to reach its destination. Correctness in

the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at ⁵⁰⁰ the following rate in addition to the usual charge for repeated messages, viz.: one per cent for any distance not exceeding one thousand miles, and two per cent for any greater distance. No employé of the company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the territorial office. . . . For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

It is alleged that all the foregoing was legible and plain, and, so far as it could apply to the sending of the message, was agreed to by H. P. Russell and that he did not request that the message be repeated, but assumed the risk of mistake and delay, and paid only fifty-eight cents for the transmission, which was the usual charge for such messages not repeated.

It is further alleged that no claim in writing has ever been presented to defendant for damages, unless this suit be so considered. The suit was filed more than sixty days after the filing of the message. That the message by some mistake was received at the Franklin ⁵⁰⁰ office as to J. A. Russell at 2:05 p. m., and was immediately sent out by the messenger boy to be delivered to J. A. Russell, but he could not be found, and about 6 P. M., on the suggestion of some one acquainted with the people of Franklin, the message was delivered to J. W. Russell. It is also alleged that when J. W. Russell received the message that he received notice of the contract as before set out and all the foregoing facts are pleaded in bar of plaintiff's claims, but appellant admits that plaintiff, or at least J. W. Russell, is entitled to fifty-eight cents. That getting the word J. A. instead of J. W. caused the delay in the delivery of the message.

In appellant's amended answer it is alleged that if the message had been promptly delivered that appellees could not have

shipped the mules on that day. That they had no mules in or near Franklin on that day, but did get the message in time to have shipped the mules on the next day.

Appellees' reply may be considered a denial of all the averments in the answer and amended answer, and it is also alleged that appellant had at Franklin an incompetent agent on that day; that he was merely a cub and unacquainted with the local business of appellant. Appellees also denied that H. P. Russell ever agreed to the stipulation on back of the message, and also alleged that the same was null and void and against public policy. The reply was traversed by appellant.

Appellees were permitted to amend their reply and ⁶⁰⁰ in it a waiver of the sixty days' notice was pleaded and the said plea was traversed by appellant.

A trial resulted in a verdict and judgment in appellee's favor of one hundred and twenty-five dollars. Appellant's motion for a new trial having been denied, it prosecutes this appeal.

The first and second grounds for new trial need not be noticed. The third ground is, that the verdict is not sustained by sufficient evidence and is contrary to law. There was proof introduced by appellees conducing to show that they had a load of mules at the time which they could and would have shipped to Atlanta December 21, 1893, if the message had been delivered to J. W. Russell within a reasonable time after it reached Franklin, and that they sustained a loss by reason of not shipping the mules on that day to the amount of more than one hundred and twenty-five dollars; hence, the jury were authorized to find the amount named. This case is unlike the case of *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126. The damages in this case at bar were not remote or speculative in a legal sense.

Instructions Nos. 1, 2, 3, and 4 given by the court were as favorable to appellant as it was entitled to, and, if this be true, then the instructions asked by appellant were properly refused by the court.

It is very ably argued by appellant's counsel that the printed terms on the back of the paper on which the message was sent were assented to by the sender, and therefore became part of the contract and binding upon the sender and receiver, and it is especially insisted that the stipulation as to repeating the message is a complete ⁶⁰¹ bar to a recovery of more than fifty-eight cents, the amount paid for the sending of the message, and we

41 Am. Rep. 500; Tyler v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Ellis v. American Tel. Co., 13 Allen, 234."

It is often of the utmost importance to the sender or receiver of messages that the same should be in cipher or obscure, because if sent in plain language the contents would often become known and the object in view defeated; hence, public policy forbids that appellant should by any contract exempt itself from the damages resulting from its negligence in transmitting such messages. It is the province of the law-making power to prescribe the limit in which an action may be brought; hence, the limitation of sixty days, if not an attempt to vary the statute of limitation, would, if enforced, have that effect, and in this case the requirement that the demand should be made in writing is clearly unreasonable and contrary to public policy and is in violation of section 196 of the constitution. A contract that notice or demand of a claim for damages should be given in a reasonable time, and, if not given, that fact to be taken as prima facie evidence of the invalidity of the claim, might be upheld.

The real question in this case is as to the negligence of appellant, and if the injury was caused by the negligence of appellant no contract or agreement can bar a recovery.

605 Appellant contends that section 199 of the state constitution could not make telegraph companies common carriers. It is not necessary to discuss the question of fact as to whether said section did in fact cause such companies to become common carriers, for it is evident that by the provisions of said section they are to be treated as such carriers, and therefore come within and are bound by the provisions of section 196, which provides that no common carrier shall be permitted to contract for relief from its common law liability. Nor is that section of the constitution in conflict with the interstate commerce clause of the constitution. A fuller discussion of the section *supra* may be found in *Ohio etc. Ry. Co. v. Tabor*, 98 Ky. 503. The general rule is, that the law of the place where the contract is to be performed governs, subject, of course, to the rule that a contract which is void by the law of the place where made is void everywhere: *Story on Conflict of Laws*, sec. 243; *Lawson on Remedies and Proceedings*, 7th ed., sec. 3873.

The proof in this case as to the negligence was sufficient to sustain the verdict and no error of law to the prejudice of appellant's substantial rights having occurred on the trial, the judgment of the court below is affirmed.

TELEGRAPH COMPANIES—DAMAGES FOR DELAY IN DELIVERING MESSAGES.—A telegraph company is answerable for special or actual damages resulting from its failure to deliver a message promptly: *Notes to Western Union Tel. Co. v. Moore*, 54 Am. St. Rep. 521; *Baldwin v. Western Union Tel. Co.*, 44 Am. St. Rep. 197; *Reed v. Western Union Tel. Co.*, 58 Am. St. Rep. 618; and the addressee of a message may recover damages for delay in delivery. If the sender was acting as his agent and the company had notice of that fact: *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; 30 Am. St. Rep. 23, and note. Compare note to *Western Union Tel. Co. v. Wilson*, 37 Am. St. Rep. 134, showing that a telegraph company is not liable for loss consequent upon its failure to deliver a message in cipher, or which does not indicate on its face that such loss might result; but authorities to the contrary are therein cited.

TELEGRAPH COMPANIES AS CARRIERS—CONTRACTING AGAINST NEGLIGENCE—VALIDITY OF STIPULATIONS.—A telegraph company is a common carrier of intelligence: *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326; 48 Am. St. Rep. 720; and cannot, by contract, exempt itself from liability for negligence in the transmission or delivery of messages: *Reed v. Western Union Tel. Co.*, 135 Mo. 661; 58 Am. St. Rep. 609, and note; *Brown v. Postal Tel. Co.*, 111 N. C. 187; 32 Am. St. Rep. 793, and note; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126. A stipulation in the printed blanks used by a telegraph company exempting it from liability for its negligence in the transmission of unrepeated messages beyond the price of sending the same, is unreasonable and void as against public policy: *Brown v. Postal Tel. Co.*, 111 N. C. 187; 32 Am. St. Rep. 793, and note; *Francis v. Western Union Tel. Co.*, 58 Minn. 252; 49 Am. St. Rep. 507, and note; monographic note to *Webbe v. Western Union Tel. Co.*, 61 Am. St. Rep. 217, on whether stipulations in blanks of a telegraph company are binding on the receiver of a message. The liability of the company to the receiver of a message transmitted by it is not altered by the fact that the sender did not insure it or have it repeated: *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338. So a condition in such blanks that the company will not be answerable in damages, in any case, for delay in the delivery of a message, if the claim is not presented within a limited time, is unreasonable: *Francis v. Western Union Tel. Co.*, 58 Minn. 252; 49 Am. St. Rep. 507. Contra, note to *Pacific Tel. Co. v. Underwood*, 40 Am. St. Rep. 494. Such a condition has been held void as an attempt, on the part of the company, to limit its liability for its negligence by enacting for itself a statute of limitations: *Pacific Tel. Co. v. Underwood*, 37 Neb. 315; 40 Am. St. Rep. 490. The receiver of a dispatch will certainly not be bound by a provision thereon, requiring a claim to be presented within sixty days, in the absence of proof that he assented to such a provision: *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 617; 61 Am. St. Rep. 207, 210, and note at p. 216.

TELEGRAPH COMPANIES—CIPHER MESSAGES.—A telegraph company is liable for not transmitting, correctly a cipher message, whose meaning is unknown to the operator, to the same extent as though the message was written in the ordinary way, and its meaning known to him: Note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 786. Contra, note to *Western Union Tel. Co. v. Wilson*, 37 Am. St. Rep. 134; *Hill v. Western Union Tel. Co.*, 42 S. C. 367; 46 Am. St. Rep. 734.

CONTRACTS.—THE LAW OF THE PLACE where a contract is to be performed governs its validity: Note to *Buckley v. Humason*,

86 Am. St. Rep. 639. Compare what is said in the note to *Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 778, as to whether a contract is void everywhere if void where made.

GERKINS v. KENTUCKY SALT COMPANY.

[100 KENTUCKY, 784.]

REMAINDERMAN AND LIFE TENANT.—NATURAL GAS, when in place, is a part of the land, and goes with the inheritance. Hence, if a company asserts a right, under a contract of lease with a life tenant, to operate a gaswell on the land owned in remainder, the contract, so far as the remaindermen are concerned, should be treated as void; but where the company entered with knowledge of two of the remaindermen, and under a grant from another, and, at great cost, erected machinery, and other improvements, there should be an equitable adjustment of the rights of the parties by first reimbursing the company for its improvements, and then allowing the remaindermen a fair royalty on any further operations of the well by the company; otherwise, it must be closed.

Ernest MacPherson, W. W. Thum, and William J. Hendrick, for the appellants.

James P. Gregory, and Fairleigh & Straus, for the appellees.

785 HAZELRIGG, J. The Kentucky Salt Company is asserting the right to operate a gas well on land owned in remainder by the appellants, and bases its claim to do so on a contract of lease authorizing an entry on the land, and the opening of the well, made alone with the owner of the life estate, who was also one of the remaindermen.

The question, therefore, is, May the life tenant lease the land for the purpose of boring for natural gas, and transport it as an article of commerce without impeachment for waste? If not, his lessee may be enjoined and required to account.

In the courts of Pennsylvania and West Virginia, where the characteristics of this substance have been considered with great care, it is held that where the tenant, under proper authority, bores a well for oil and unexpectedly finds gas, he may separate it and have it without additional compensation to his landlord. Its nature is said to be so volatile and fugitive as that when it becomes severed from the land it belongs to the first taker: *Wood County Petroleum Co. v. West Virginia Trans. Co.*, 28 W. Va. 210; 57 Am. Rep. 659; *Westmoreland etc. Nat. Gas. Co. v. De Witt*, 130 Pa. St. 235.

All the authorities agree, however, that when in place it is a part of the land and goes with the inheritance.

In the recent case of *Keon v. Bartlett*, 41 W. Va. 559, 56 Am.

St. Rep. 884, the respective rights of life tenants and remaindermen in certain natural gas wells ⁷³⁶ were involved, and it was held that where the severance was lawful, as where the mines of gas were open when the life tenant came in, he might work them even to exhaustion; but that if the severance was unlawful the remaindermen might sue at law or enjoin in equity and have an accounting. These principles are conclusive of this case and entitle the appellants to relief. Just what the relief should be is a more difficult question. The company, the purchaser of the life estate, with the knowledge of two of the remaindermen out of the six, and with the consent of another of them, in fact under a grant from him, has entered on the premises and at a great cost erected its machinery, et cetera. The specific relief asked is to close the well. To do this will entail a great loss on the appellees, and in all probability benefit the appellants in no respect whatever, for, confessedly, they cannot enter on the land or work the mine, and, when they shall eventually come into the remainder, their gas will likely have been pumped off through the wells of their neighbors.

In a former consideration of the case we indicated that the appellants might have an accounting with the life tenant for rent received by him, but this seems to be very inadequate relief, and that opinion is withdrawn.

The contract of lease should be treated as void as against appellants, and after the company has been reimbursed for its improvements, unless this has already occurred, appellants should receive a fair royalty for any further operation of the well by the company; otherwise it must be closed.

⁷³⁷ The judgment denying relief to the appellants is reversed to the end that an equitable adjustment of the rights of the parties may be had on principles consistent with this opinion.

REAL PROPERTY — LIFE TENANT — EQUITY.—NATURAL GAS, in its place, in the land, is a part of the land itself, just as are petroleum oil, coal, timber, and iron: *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 433; *Williamson v. Jones*, 43 W. Va. 562; 64 Am. St. Rep. 891; and they are all governed by the same principle. A tenant for life cannot do anything entailing permanent injury to the estate of the reversioner or remainderman. He is answerable to them for waste caused by extracting petroleum oil from the land, without authority, and may be enjoined from committing it; but they must do equity, if they ask equity, and the life tenant may set off, against rents and profits, all costs of producing oil, including the cost of boring productive wells: *Williamson v. Jones*, 43 W. Va. 562; 64 Am. St. Rep. 891, and note. Compare *Koen v. Bartlett*, 41 W. Va. 559; 56 Am. St. Rep. 884.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BRETENWISCHER v. CLOUGH.

[111 MICHIGAN, 6.]

DEEDS—PAROL EVIDENCE TO SHOW CONSIDERATION.—Parol evidence is admissible to show an agreement by a grantee to allow the grantor, as part consideration for the deed, the privilege of raising a crop for his own use on the land conveyed.

REPLEVIN—DEMAND.—One who claims a crop of grain under an agreement for the tilling of his land on shares need not make a demand before bringing suit in replevin to recover the grain. If the person sowing it converts the whole crop to his own use and denies the agreement under which the plaintiff claims.

Replevin. Judgment for defendant, and plaintiff appealed.

A. F. and F. M. Freeman, for the appellant.

F. D. Kearney, and T. A. Bogle, for the appellee.

* **HOOKEE, J.** Plaintiff, a mortgagee of the premises, took a conveyance of a farm from a grantee of the mortgagor. At the time of the transfer, the grantor's son, the defendant, lived upon the place, and plaintiff claimed that, a few days later, the plaintiff went to the farm, where a talk was had between the plaintiff and defendant. The parties disagree about the nature of this transaction. The plaintiff claims that he then contracted to allow the defendant to put in a crop of wheat for one-third of the ⁷ crop, to be delivered in the half-bushel, upon the place, and defendant was to remain in the house until April 1st following. The defendant claims that nothing was said about his putting in the wheat on shares, or renting the place; that his possession was out on April 1st; and that all that was said in

the conversation about the wheat was that defendant said he was going to put in twenty or twenty-five acres, and plaintiff said that he must "put it in good, because he wanted to seed it down." The defendant further asserted that, when the deed was made, as consideration therefor, the plaintiff agreed that he would allow the defendant's father to grow twenty or twenty-five acres of wheat upon the place, and that this inured to defendant's benefit.

Upon the trial, counsel for the defendant offered to prove this state of facts, but it was excluded by the court, and the plaintiff claims that it was error for the court to permit the statement to be made. The theory upon which this testimony was excluded appears to be that such arrangement was a contradiction of the deed, and therefore its admission would have the effect of varying the deed by parol testimony, as in case of *Adams v. Watkins*, 103 Mich. 431. We think the cases are plainly distinguishable. In that case a majority of the court were of the opinion that the arrangement claimed to have been made was, in effect, a parol reservation of a growing crop. In this case there was a growing crop, and, so far as appears, the deed was intended to convey the entire title. As a consideration for such conveyance, the plaintiff agreed to allow the defendant's father to sow and raise a crop within the year following. This was a contract, performed on one side, for an executory promise, unperformed on the other. Had the plaintiff prevented the raising of the crop, an action upon the contract for damages for its breach would have been properly brought. But he was permitted to sow, and the defendant thereby acquired rights in the crop. It is much like a case where one says, "If you will deed me your house and lot, I will let you move into it for six ⁸ months." If, after this arrangement should be carried out by the parties, the owner should bring an action for six months' rent, he would not be allowed to recover. In other words, the executory contract was oral, as such usually are. On the one hand, it was carried out by making the deed. On the other, the grantor was permitted to raise a crop. There was no reservation of any interest in the premises, but reliance upon a promise to permit the raising of a crop, which was a promise that the grantee might make, although he had not acquired the title: *Dayton v. Dakin's Estate*, 103 Mich. 73. It would, therefore, have been proper testimony in the case.

The defendant harvested and removed the crop from the premises, claiming to own it, and the plaintiff replevied one-third of

the crop, which was being threshed at the time of the issuance of the writ. The defendant was not permitted to show that he owned the wheat, as already stated, but it was left to the jury to find whether a demand was made before suit, upon the instruction that plaintiff could not recover without a previous demand. It is plain that the defendant was disputing the plaintiff's title, by denying the contract under which plaintiff claimed a right to a share of the crop, under circumstances which showed that he had converted the entire crop to his own use. Demand, in such a case, was an idle ceremony, and was unnecessary. If plaintiff's claim was true, the defendant had a right to the custody of his one-third only for the purpose of threshing and delivery; and when he removed it, for the purpose of preventing the plaintiff from obtaining such share, with the intention of keeping it, under a denial of plaintiff's claim, and upon a claim of ownership, he was in a similar position to a bailee who sets up a claim of ownership against the true owner. Such a claim was inconsistent with the hypothesis that he would deliver the wheat upon demand, which rendered a demand unnecessary: Wells on Replevin, sec. 374; Cobbey on Replevin, sec. 448, and cases cited; Byrne v. Byrne, 89 Wis. 659; Hyland v. Bohn Mfg. Co., 92 Wis. 157; Carl v. McGonigal, 58 Mich. 567; Whitney v. McConnell, 29 Mich. 12.

We cannot determine that the defendant was right in his contention as to ownership, or that the case did not turn upon the want of a demand, and hence must reverse the judgment. A new trial is ordered.

The other justices concurred.

EVIDENCE—PAROL—CONSIDERATION OF DEED.—The consideration of a deed may be proved by parol to be wholly different from that expressed therein: Moffatt v. Bulson, 96 Cal. 106; 31 Am. St. Rep. 192. A statement of the consideration in a deed and a recital of its payment may be varied and controlled by parol evidence: Cardinal v. Hadley, 158 Mass. 352; 35 Am. St. Rep. 492, and note; extended note to Schemerhorn v. Vanderheyden, 3 Am. Dec. 306, 307.

REPLEVIN—DEMAND BEFORE SUIT.—It is only where one obtains possession of property lawfully that demand is necessary to support replevin or trover: Velsian v. Lewis, 15 Or. 539; 3 Am. St. Rep. 184. Where the taking of property is tortious, no demand is necessary: Galvin v. Bacon, 11 Me. 28; 25 Am. Dec. 258; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118.

KNIGHTS v. PIELLA.

[111 MICHIGAN, 9.]

BAILMENTS—THEFT OF GOODS.—A letter from a retail jeweler to a wholesale dealer in diamonds, stating that the former has a customer for a diamond, and requesting the wholesaler to send him some diamonds to keep for some time, as the customer is slow on selection, is simply a request to send the stones with the option to purchase. The custody of the goods thus sent is in the nature of a bailment, and the title remains in the sender. Hence, if the goods are stolen while in such custody, without the fault or negligence of the custodian, the sender must bear the loss.

BAILMENTS—EVIDENCE.—Neither a purchase nor an unconditional promise to return diamonds is shown by a letter from a retail jeweler to a wholesale dealer, from whom he has received the diamonds, with the privilege to purchase, stating that the goods have been stolen and promising to pay for them. Such letter does not affect the relation of bailor and bailee existing between the parties.

BAILMENTS.—CARE REQUIRED of a bailee in case of bailment for mutual benefit of the parties is that degree of care and diligence to be expected from ordinarily prudent persons under similar circumstances.

BAILMENTS—EVIDENCE.—The defense that goods which were the subject of a bailment were stolen from the bailee is admissible under the general issue, in an action by the bailor to recover the value of the goods from the bailee upon his failure to redeliver.

BAILMENTS—EVIDENCE—BURDEN OF PROOF.—In an action by a bailor to recover the value of goods from the bailee upon failure of the latter to redeliver, the burden of proof is upon the bailee to establish the loss by theft of the goods if he relies thereon. Such proof, *prima facie*, excuses the failure to redeliver unless want of due care on his part is disclosed, and the burden of proof is then cast upon the bailor to show want of such care.

W. A. Fraser, and Varnum and Anderson, for the appellants.

J. P. Lee, for the appellee.

¹⁰ **HOOKE**R, J. The plaintiffs were wholesale dealers doing business in Chicago, and defendant a retail dealer in jewelry at Lansing. The defendant wrote, and plaintiffs received, the following letter, viz:

“Lansing, Mich., June 21, 1893.

“C. H. Knights & Co.

“Sirs: I have a customer for a diamond. I think he will take about one and one-half carat stone. Send me some, but good qualities. If I sell him a stone, it will sell a half dozen more in a short time. He is a man of big influence. Send them from one and one-fourth up to two carats. Send two or more at one and one-half carats, in different quality, if you can spare

them. I may have to keep them for ten days to two weeks. He is pretty slow on selection, but good as ———.

“CHAS. A. PIELLA.”

¹¹ The plaintiffs forwarded to him seven diamonds, aggregating one thousand and thirty-three dollars and nineteen cents in value, accompanied by the following memorandum:

“Memorandum from C. H. Knights & Co., Wholesale Dealers, Columbus Memorial Building, Chicago, corner State and Washington streets.

“Chicago, June 22, 1893.

“Do not remove or deface cards or tags on goods.

“C. H. Knights.

W. H. Gleason.

“Duplicate. These goods belong to us until paid for.

“Mr. C. A. Piella, Lansing, Mich.

2324 one dia. 2 1-16	\$ 80.00
2328 one dia. 1 $\frac{1}{4}$	115.00
2325 one dia. 1 1-5, 1-16, 1-64	96.00
2223 one-dia. 1 $\frac{1}{8}$	82.00
X one dia. 1 $\frac{1}{2}$	110.00
2330 one dia. 1 $\frac{1}{4}$ 1-16 1-32	82.00
2321 one dia. 1 $\frac{1}{4}$ \$76.00 (per carat)”	

The testimony of the defendant shows that he received the diamonds, and that the same were placed in a showcase, from which they were stolen in the course of the next hour. Defendant having refused to pay for the stones, this action was brought to recover their value. The court instructed the jury that the title to the goods was in the plaintiffs, and that the goods were left with the defendant to be sold for their mutual benefit, or returned, and that the defendant was not an insurer of the safety of the goods, and was held to the exercise of ordinary care only, and that the burden of showing the want of such care was upon the plaintiffs. It was contended by the plaintiffs' counsel that the defendant acknowledged his liability by the following letter, written soon after the loss:

“Lansing, Mich., June 23, 1893.

“C. H. Knights & Co.

“Sirs: Forepaugh's circus is in town to-day. I just received your package of diamonds, but I didn't have them long. I got robbed of them after I received them—one ¹² hour afterwards; my stones, and the stones I got from you this morning. I notified the Pinkertons, in Chicago; the Jewelers' Alliance; also,

H. H. Botts, of New York. I belong to this insurance company. Will you please send me a duplicate bill? They stole bill and all with the book out of my case. Don't be alarmed. I shall pay you every cent I am indebted to you—it is all the debts I have in God's world—even if I have to sell my home to pay it.

Yours truly,

“CHAS. A. PIELLA.”

Upon a motion by plaintiffs' counsel to strike out certain testimony, the following colloquy between court and counsel occurred:

“Court—Setting aside the second letter for the purpose of this question, in considering it, do I understand that it is agreed between counsel that, if a sufficient degree of care were exercised, the loss would follow the title to the property?”

“Mr. Day—I think that is true; no question about it.

“Mr. Varnum—I have no doubts about that question, your honor.

“Court—Upon that question I have some doubts. I have not any doubt as to where the title to this property was at the time of the alleged robbery or loss. . . . This is a reservation of title, clearly, under the circumstances of this case, on the part of C. H. Knights & Co. Under that situation the goods are said to have been stolen. I am not quite certain myself as to the duties imposed upon a consignee in a case of this kind, concerning the return of the goods; but, on the basis of what was stated in this case, I should assume that the loss would follow the title, providing the consignee had exercised such care over the goods as their character, value, and the circumstances of the case required—reasonable and fair care. I feel very certain as to where the title was. I do not feel quite so certain as to the consequences. This matter must come to an end somewhere. I am going to take the opinion of the jury as to the question of care exercised by Mr. Piella in this matter.

“Mr. Varnum—What position does your honor take in regard to the letter of June 23d? Is that to be submitted to the jury?”

¹³ “Court—My present view about that letter is, that if Mr. Piella exercised proper care under the circumstances, there was no liability upon his part, and the letter would not create one. If he did not exercise that care, there was a liability following, by the terms of that letter, which would permit you to sue in assumpsit without a special count. It would be an express promise that would not bring it within the common counts.”

This excludes the claim now made that the defendant unconditionally promised to purchase or return the diamonds. The letter written by the defendant in the first instance was not equivalent to an unconditional order for goods, but a request to send goods with the privilege of purchase. It was not even a purchase with the right to return reserved, for there was no promise to buy. In this respect the case differs from those which hold that the vendee in a conditional sale takes the risk of the loss or destruction of the property: *Walker v. Owen*, 79 Mo. 569; *Snyder v. Murdock*, 51 Mo. 15; *Burnley v. Tufts*, 66 Miss. 48; 14 Am. St. Rep. 540; 1 Beach on Contracts, sec. 141, and cases cited. The custody of these goods was more in the nature of a bailment, as contended by counsel: *Schouler on Bailments*, secs. 3, 6. As said by Mr. Justice Cooley in *Dunlap v. Gleason*, 16 Mich. 161, 93 Am. Dec. 231, the defendant might "terminate the bailment and purchase by payment": See, also, *Dewes Brewery Co. v. Merritt*, 82 Mich. 201; *Powell v. Eckler*, 96 Mich. 538; *Caldwell v. Hall*, 60 Miss. 330; 45 Am. Rep. 410; *Weir Plow Co. v. Porter*, 82 Mo. 23; *Knight v. New England Worsted Co.*, 2 Cush. 283.

It being apparent that, upon the admitted facts, the title was in the plaintiffs, and upon the admitted law, as above shown, that the court had a right to direct the jury that the owner of the title must bear the loss, unless the defendant was negligent, or the second letter showed a reason to the contrary, many of the questions raised become unimportant. We think the letter in question did not show a purchase, or an unconditional and ¹⁴ unqualified promise to return the stones and, in our opinion, the circuit judge was right in saying that the defendant was called upon to exercise ordinary care and diligence, as the bailment was one for the mutual advantage of the parties. There is much conflict in the books upon the subject of the burden of proof in actions arising upon the loss or destruction of property while in the hands of the bailee. The jury were instructed that "the burden of proof is upon the plaintiffs, C. H. Knights & Co., to show that he did not, and thus, by the preponderance of evidence, to show that he was lacking in that ordinary degree of care that I have mentioned."

Upon this record, the defendant has established the fact and circumstances of the theft, without contradiction. There is no presumption of negligence from the mere fact of the loss or theft, and while there is much reason for the rule, adhered to in many states, that the defendant has the burden of proving the

fact of loss, it does not necessarily follow that a presumption of negligence arises; and, if the facts shown in connection therewith do not fail to excuse, the onus is on the plaintiffs to shake defendant's exculpation. This does not deny the proposition that when the bailment is proved, and a refusal to deliver is established, the plaintiff has made out a *prima facie* case, and the inference of wrong by the defendant follows, or that it is then for the defendant to explain the loss and exonerate himself, which he may do by showing circumstances which *prima facie* excuse the failure to deliver. To this extent, and in this sense, a burden rests upon the defendant; but, if this question of fact becomes a disputed one, the evidence of the plaintiff must preponderate; and if the language of the charge, viewed abstractly, extends further, it cannot be said to have prejudiced the plaintiffs, under the established facts, the disputed question in this connection being whether or not the care exercised was equal to that to be expected from ordinarily prudent persons under similar conditions and ¹⁵ circumstances: See Schouler on Bailments, sec. 23, for a discussion of this subject.

It remains to add that we think the defense was allowable under the plea of the general issue, being a complete answer to the claim of the conversion.

As it is not in our province to pass upon the disputed question of fact, we cannot disturb the verdict.

The judgment is affirmed.

The other justices concurred.

BAILMENT—CARE REQUIRED OF BAILEE—BURDEN OF PROOF.—All bailees are required to exercise care and diligence in protecting and keeping the thing bailed; but different degrees of diligence are required according to the nature of the bailment: *Merchants' Nat. Bank v. Guilmartin*, 93 Ga. 503; 44 Am. St. Rep. 182, and note. See *Tombler v. Koelling*, 60 Ark. 62; 46 Am. St. Rep. 146; *Isham v. Post*, 141 N. Y. 100; 38 Am. St. Rep. 766; *Higman v. Camody*, 112 Ala. 257; 57 Am. St. Rep. 33, and note. A warehouseman is not liable for goods stolen while in his charge, either by his own servants, or by other persons, if he has exercised common diligence, and has taken such precautions as are usual with those engaged in the same business to protect such goods: See monographic note to *Schmidt v. Blood*, 24 Am. Dec. 154. The burden of proof as between bailor and bailee is as follows: The bailor must prove the contract of bailment, and the delivery of the goods; then the bailee, if he wishes to exonerate himself from liability for their loss, must show the fact and manner of loss; and the bailor must assume the burden of establishing that the loss was due to the negligence of the bailee: *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586, and note. See *Higman v. Camody*, 112 Ala. 257; 57 Am. St. Rep. 33, and note.

CULLEN v. HARRIS.

[111 MICHIGAN, 20.]

EXEMPTIONS OF PROCEEDS OF EXEMPT PROPERTY.

The proceeds of a voluntary sale of exempt personal property, designed for investment in other exempt property to take the place of that sold, are not subject to attachment or garnishment.

Replevin by A. Cullen against W. E. Harris. Cullen contracted to purchase a yoke of oxen for a stated price, part of which was paid down, the remainder to be paid upon the delivery of the oxen in a few days. Before the day of delivery, Cullen was garnished by a creditor of Harris. Upon the day fixed for delivery, Cullen demanded the oxen, stating that they had been garnished, and that he was willing to pay the remainder of the purchase price when it was ascertained to whom he should pay it. Harris refused to deliver the oxen until paid the balance of the purchase price, and stated to Cullen that he was selling the oxen to procure a team of horses with the proceeds to take their place. Harris was a farmer, and had no other team with which to carry on his business, except such oxen. Judgment for Harris, and Cullen appealed.

Z. B. House, and Black & Brown, for the appellant.

D. E. Adams, E. S. Lee and J. S. Parker, for the appellee.

21 MONTGOMERY, J. The sole question presented on the record is whether, under the circumstances set out in the statement of facts, the proceeds of the sale of exempt property, designed for investment in other exempt property, to take the place of that sold, are subject to attachment while in the hands of the debtor, kept as a separate fund, or are, before reaching his hands, subject to garnishment. The authorities upon this subject are inharmonious. There are cases holding, as contended by plaintiff, that the proceeds of the voluntary sale of property exempted from execution are not exempt: *Wygant v. Smith*, 2 Lans. 185; *Knabb v. Drake*, 23 Pa. St. 489; 62 Am. Dec. 352. The latter case even goes further, and holds that, where property is taken from the owner by proceedings in invitum, a judgment recovered for such wrong is subject to garnishment. But this holding is in conflict with the great weight of authority, and it is generally held that in such case, as well as in the case of a loss of exempt property by fire, the proceeds are exempt, at least until such time as the owner has reasonable opportunity to appropriate the proceeds to the purpose of replacing the exempt property wrongfully taken from him, or consumed by fire: See

Cooney v. Cooney, 65 Barb. 524; Tillotson v. Wolcott, 48 N. Y. 188; Mudge v. Lanning, 68 Iowa, 641; Rood on Garnishment, sec. 98; 1 Shinn on Attachment, sec. 71; Thompson on Homesteads, sec. 748. It has also been held in various jurisdictions where the rule obtains, as in this state, both as to personal and real property exempt, that the owner has the right to sell or exchange such exempt property, ²² and that such sale does not result in establishing a lien in favor of the creditor, or render the property, after the sale, subject to levy, that the money derived from the sale of a homestead, designed in good faith to be applied to the purchase of another homestead, and kept separate from other funds for that purpose, is not subject to seizure by creditors: See Watkins v. Blatschinski, 40 Wis. 347; State v. Geddis, 44 Iowa, 537; 1 Shinn on Attachment, sec. 71; Rood on Garnishment, sec. 97. We can conceive of no reason for distinguishing between the proceeds of exempt personal property and the proceeds of an exempt homestead, and we think the rule of the Wisconsin and Iowa courts in harmony with the liberal interpretation of the exemption laws which has always obtained in this court.

The judgment of the court below will be affirmed.

The other justices concurred.

Proceeds of Exempt Personalty. Whether also Exempt from Levy.

Voluntary Sales.—Although the exact question whether the proceeds of a voluntary sale of personal property exempt from levy, designed for investment in other exempt property to take the place of that sold, are subject to levy under attachment, garnishment, or execution, has never, so far as we are advised, been before the courts for adjudication except in the principal case, yet the doctrine is well settled that the proceeds of personalty, exempt from execution, voluntarily sold, without the purpose to reinvest in other exempt property, are ordinarily not exempt: Harrier v. Fassett, 56 Iowa, 264; Knabb v. Drake, 23 Pa. St. 489; 62 Am. Dec. 362. "We are aware of no provision of law which extends the exemption of stock in trade to the proceeds of such stock realized upon a sale thereof": Roundy v. Converse, 71 Wis. 524; 5 Am. St. Rep. 240-242. "When a debtor voluntarily disposes of exempt property, the proceeds may be reached by his creditor, for, by so doing, he voluntarily deprives himself of the benefit of the statute, and waives the privilege thus secured": Andrews v. Rowan, 28 How. Pr. 126-128. Thus debts due the debtor, which accrued from the voluntary sale of personal property which was exempt from attachment, may be levied upon and held by trustee process: Scott v. Brigham, 27 Vt. 561.

In Avery Planter Co. v. Cole, 61 Ill. App. 494-497, it was said that: "Undoubtedly, the debtor could sell the property exempt from exe-

cution, and receive other property in place of the exempt property, which also might be exempted under the statute. He could sell for cash, but when he sells on credit and leaves the debt standing, he loses his right to claim exemption as to the debt."

Purchase money in the hands of a vendor, where the article sold was paid for, but was claimed and taken away by a third person before delivery, is not exempt as against the creditors of the vendee, although the article would be exempt: *Edson v. Trask*, 22 Vt. 18; and debts due a vendor for the sale of exempt property are not exempt from being subjected to his debts, where the purchaser bought other property also, and it cannot be shown that the balance due is for the exempted part: *White v. Capron*, 52 Vt. 634; but money in the hands of a purchaser of exempt property, which was to be paid for on delivery, is not liable in garnishment for the debt of the vendor, who claims a rescission at the time of the garnishment because the goods are not paid for: *Paul v. Reed*, 52 N. H. 136.

Proceeds of exempt property sold under attachment should be distributed the same as exempt property, when the owner thereof is dead: *Meyers v. Forsythe*, 10 Bush, 394.

It is a general rule that if exempt property is exchanged for other property, the property received in exchange is not exempt from attachment or execution. Thus if an exempt horse is exchanged for another horse the latter is not exempt: *Lloyd v. Durham*, 1 Winst. 288; and the exemption of a soldier's pay and bounty from levy or sale under execution does not extend to property purchased with, or otherwise voluntarily obtained in exchange for, such money. *Wygant v. Smith*, 2 Lans. 185. Although a defendant in execution may sell articles exempt from sale after the execution reaches the sheriff's hands and convey a good title, yet if the thing received as an equivalent, or in exchange, is not also exempt it may be levied upon: *Pool v. Reid*, 15 Ala. 826. A colt not exempt under the statute as being kept for team work is not rendered exempt for the reason that it was received in exchange for a horse that was so exempt: *Connell v. Fisk*, 54 Vt. 381. A different rule, however, prevails in Georgia, and it is there held that when exempt personalty has been exchanged, whether legally or not, for property of a similar kind, the latter stands, as against the exempt debtor's creditors, in the place of the former, so long as the exchange is not repudiated by any of the parties in interest: *Morris v. Tennent*, 56 Ga. 577.

New goods, obtained by purchaser using the proceeds of the sale of other goods that have been set apart as exempt, are also exempt, not exceeding in value the original exemption: *Dodd v. Thompson*, 63 Ga. 393; although it has also been held in that state that property bought with the proceeds of exempt property, consisting of a stock of goods, which newly purchased property has been mixed with the old so that neither can be identified, is not exempt: *Smith v. Turnley*, 44 Ga. 243.

Under the Alabama statute, one thousand dollars' worth of personal property is exempt from levy or sale, and in *Brewer v. Granger*, 45 Ala. 580, the court said: "The exemption applies to

money as well as to any other description of property, and the use of the property depends upon its adaptability. There is no restriction upon the family to make the best use of it they can. If they prefer to use it as merchandise, anything they may get in exchange for it would likewise be exempt to the value of one thousand dollars."

As to the exemption of the products or profits of exempt property, it has been held that sheep purchased with the proceeds of an exempt crop are exempt, though such proceeds were first turned into money: *Wade v. Weslow*, 62 Ga. 562; and a crop, made by the use of provisions, clothing, and necessities which were purchased by using certain property which was exempt, is also exempt, if it is of no greater value than the exemption allowed by law: *Johnson v. Franklin*, 63 Ga. 378. And a crop made by the use of exempt property is also exempt up to the statutory value of exemption, although it is of greater value than the property originally exempted: *Kupferman v. Buckholts*, 73 Ga. 778.

Judgments, Affecting Exempt Property.—Generally, a judgment recovered for exempt property is also exempt. Thus, money due a debtor as damages for attachment and detention of his exempt personalty, and money collected by an officer under an execution issued upon judgment recovered for such a trespass, is not subject to levy or sale under process: *Stebbins v. Peeler*, 29 Vt. 289. And a judgment against a sheriff for the wrongful conversion by him of personalty exempt from sale under execution, is, together with the costs, also exempt: *Below v. Robbins*, 76 Wis. 600; 20 Am. St. Rep. 89. So a judgment recovered for the negligent killing of animals exempt from execution is also exempt: *Crawford v. Carroll*, 83 Tenn. 661; 42 Am. St. Rep. 943. Under the same rule, a judgment recovered for the value of an exempt granary, which has been severed from the realty through the wrongful act of a trespasser, is to be treated as a judgment for exempt personal property, and is therefore exempt from execution: *Wylie v. Grundysen*, 51 Minn. 360; 38 Am. St. Rep. 509. If wages for labor are exempt by statute, a judgment for such wages is also exempt: *Steel v. McKerrihan*, 172 Pa. St. 280; and a judgment in trespass for disregarding the debtor's claim for the benefit of the exemption law is also exempt: *Wilson v. McElroy*, 32 Pa. St. 82. After a judgment in damages for the conversion of exempt personalty, the debtor is entitled to have the money, and to use and enjoy it as freely as he could or might have used the property had it not been converted: *Harrell v. Harrell*, 77 Ga. 130. If, after a defendant in attachment has obtained judgment in detinue against a sheriff for property which was exempt, and the sheriff has paid the assessed value of such property to the clerk of the court, the money in his hands is not subject to garnishment at the suit of defendant's creditors: *Falconer v. Head*, 31 Ala. 513. "It would be useless to grant the privilege contained in the statute if it could be rendered of no effect by refusing an adequate remedy for the invasion of the exemption, or by permitting a recovery, when obtained for such invasion, to be wrested from the debtor by proceedings on behalf of his creditors. The judgment, when recovered by

the debtor for the wrongful invasion of his privilege of the exemption of his property from levy and sale, represents the property for the value of which it was recovered. He can make another investment of the money to be recovered in the same description of property, in the possession of which, as a householder or person providing for the support of his family, the statute will again protect him. An unreasonable or unnecessary delay in reinvesting the money in exempt property would justly affect the question. The proceeds of the judgment should be held to be protected under the statute, as exempt property, until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the description of property necessary to enable him to support his family, and in the possession of which the law will protect him as against the claims of his creditors:" *Tillotson v. Wolcott*, 48 N. Y. 188-190. A judgment recovered for the conversion of exempt personalty and its proceeds are also exempt until the lapse of such time or other act of the debtor fairly raises the presumption that he has abandoned the intention of procuring articles exempt with such proceeds, after which proceedings by the creditor may reach the proceeds of such judgment: *Andrews v. Rowan*, 28 How. Pr. 126. A judgment for the conversion of exempt property cannot be enjoined at the instance of the defendant, who is a judgment creditor of the plaintiff, although the plaintiff is insolvent: *Collett v. Jones*, 7 B. Mon. 586. If a horse worth more than the statutory exemption is sold under execution, the statutory amount is exempt, but the surplus, after deducting the costs, may be applied by the creditor: *Moultree v. Elrod*, 23 Ga. 393. A judgment for damages done to a homestead cannot be levied upon to satisfy a claim which is not a lien on the homestead: *Mudge v. Lanning*, 68 Iowa, 641; *Kaiser v. Seaton*, 62 Iowa, 463. As to exemptions of the proceeds or profits of a homestead, see the note to *Morgan v. Roundtree*, 45 Am. St. Rep. 237-239.

One case, that of *Knabb v. Drake*, 23 Pa. St. 489; 62 Am. Dec. 353, holds that a judgment in trespass for levying on property exempt from execution is not exempt, but may be attached. A judgment for conversion of exempt property is subject to garnishment in an action in another court, when there is nothing to show how much of the judgment proceeded from exempt property, and part of the property converted was not exempt: *Burke v. Hance*, 76 Tex. 76; 18 Am. St. Rep. 28. Where a plaintiff in replevin has recovered a judgment for a horse or his value, and also for damages for the wrongful taking and detention of the horse, the damages for the taking and detention are not exempt, although the horse is exempt property: *Johnson v. Edde*, 58 Miss. 664. If a judgment is part of the debtor's exemption or is the result of the unlawful taking of exempt property, it is not subject to be set off against a judgment held by the defendant in execution: *Beckman v. Manlove*, 18 Cal. 388; *Curlee v. Thomas*, 74 N. C. 51; *Meyers v. Forsythe*, 10 Bush, 394; *Butner v. Bowser*, 104 Ind. 255. Thus, in an action for trespass for selling exempt property under execution, the defendant

cannot set up the judgment against the plaintiff on which the execution issued as a setoff: *Wilson v. McElroy*, 32 Pa. St. 82.

The right to set off judgments against each other cannot be so exercised as to defeat or circumvent the exemption laws: *Duff v. Wells*, 7 Heisk. 17. When exempt property, claimed as such, is sold under execution against the owner, who afterward obtains judgment against the sheriff and his sureties for conversion, the defendants cannot set off against it a judgment in their favor against the owner of such exempt property: *Ex parte Hunt*, 62 Ala. 1; and money in the hands of a sheriff, made by execution under a judgment for the conversion of exempt property, cannot be applied by the sheriff to satisfy an execution in his hands against the owner of such fund: *Howard v. Tandy*, 79 Tex. 450.

A judgment for the conversion of exempt property cannot be discharged by the defendant paying that amount to the sheriff to be applied on a judgment against the plaintiff: *Below v. Robbins*, 76 Wis. 600; 20 Am. St. Rep. 89. The purchaser of exempt property sold so that the proceeds could be used to purchase other exempt property, when sued for the price, cannot set up as a defense a note that he holds against the vendor: *Mulliken v. Winter*, 2 Duvall, 256; 87 Am. Dec. 495; and the purchaser of exempt property sold by the commissioner of the court for reinvestment, when sued by such commissioner for its value, cannot set off a claim which he may have against the owner of the exempt property: *Sirmans v. Sirmans*, 74 Ga. 541.

Proceeds of Insurance.—There is great conflict in the authorities as to whether the proceeds of insurance on exempt property are also exempt or not. A number of cases hold that when personal property, exempt from attachment, garnishment, or execution, is destroyed by fire, the proceeds of insurance upon such property are also exempt. Such is the rule laid down in *Reynolds v. Haines*, 83 Iowa, 342; 32 Am. St. Rep. 311. And in *Puget Sound etc. Co. v. Jeffs*, 11 Wash. 466; 48 Am. St. Rep. 885, it was determined that the proceeds of insurance received for the destruction of exempt personal property are also exempt if the insured intends to invest them in property similar to that destroyed. For a reasonable time, at least, the proceeds of insurance on exempt property are also exempt, in order to enable the debtor to invest them in property similar in nature to that destroyed: *Cooney v. Cooney*, 65 Barb. 524. The proceeds of insurance arising from the destruction of a building situated on homestead premises are not subject to levy or sale by a judgment creditor of the insured: *Houghton v. Lee*, 50 Cal. 101; *Cameron v. Fay*, 55 Tex. 58. But it has also been held that insurance money due on the loss of a house which was part of the homestead of the insured is not exempt from levy under attachment or execution: *Smith v. Ratcliff*, 66 Miss. 683; 14 Am. St. Rep. 606. And it has also been decided that insurance money on a homestead building may be attached in another state, although such policy is exempt where made, and the money due thereon has been paid after garnishment under a judgment: *Roche v. Rhode Island Ins. Assn.*, 2 Ill. App. 360. Insurance money, due on exempt chattels that have been

destroyed by fire, is liable to attachment in the hands of the insurer: *Wooster v. Page*, 54 N. H. 125; 20 Am. Rep. 128. If personal property exempt from execution is destroyed, the insurance money due thereon is not exempt, and is therefore subject to garnishment by a creditor of the insured: *Minniea v. German Ins. Co.*, 12 Ill. App. 240; *Fletcher v. Staples*, 62 Minn. 471. Although a life insurance policy may be exempt from levy or sale, property acquired by a sale or assignment, thereof is not so exempt: *Friedlander v. Mahoney*, 81 Iowa, 311.

Exemptions as Applied to the Proceeds of Pension Money are the subject of a lengthy note to *Rozelle v. Rhodes*, 2 Am. St. Rep. 596, 598. No attempt will be made here to discuss this topic; the later cases only will be cited. They tend to establish the rule that property purchased by a pensioner with his pension money is exempt from the payment of his debts: *Crow v. Brown*, 81 Iowa, 344; 25 Am. St. Rep. 501; *Crow v. Brown*, 86 Iowa, 741; *Dean v. Clark*, 81 Iowa, 753; *Marquardt v. Mason*, 87 Iowa, 136. These late Iowa cases expressly overrule the previous holdings in that state referred to in the note to *Rozelle v. Rhodes*, 2 Am. St. Rep. 596. If the receipts from a pension can be directly traced to the purchase money of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt. If such pension money is given as part payment for the purchase price of such property and a mortgage given thereon to secure the balance, the premises are exempt from levy or sale under execution: *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; 16 Am. St. Rep. 855. A pensioner may use his pension money in any way he sees proper for his own benefit and to secure the comfort of his family, free from the attacks of his creditors: *Holmes v. Tallada*, 125 Pa. St. 133; 11 Am. St. Rep. 880. And if he gives the money to his wife, and she buys either personalty or realty with it, taking the property in her own name, such property is, in her hands, exempt from his debts: *Marquardt v. Mason*, 87 Iowa, 136; *Holmes v. Tallada*, 125 Pa. St. 133; 11 Am. St. Rep. 880. A horse obtained by a debtor in exchange for another purchased with pension money, and exempt from levy by statute, is also exempt to its full value when no additional means are invested, though such value is in excess of the amount originally invested in the first horse: *Smith v. Hill*, 83 Iowa, 684; 32 Am. St. Rep. 329. One who pays pension money for the services of a stallion upon mares owned by him and also bought with pension money may hold the colts resulting from such service exempt from liability for his debts, to the extent at least, of the money paid for such services: *Diamond v. Palmer*, 79 Iowa, 578. Crops grown on land, other than a homestead, purchased with pension money are not exempt. The money or investment arising from the pension is alone exempt: *Haefer v. Mullison*, 90 Iowa, 373; 48 Am. St. Rep. 451. A savings bank deposit, consisting exclusively of the proceeds of a pension check, is exempt from attachment or execution: *Price v. Society for Savings*, 64 Conn. 362; 42 Am. St. Rep. 198. So it has been held that attachment does not lie against a pension check or its proceeds, when such check is deposited by the

pensioner with the bank for collection and by it collected and placed to his credit as a deposit: *Reiff v. Mack*, 160 Pa. St. 265; 40 Am. St. Rep. 720. The contrary rule is held in *Cranz v. White*, 27 Kan. 319; 41 Am. Rep. 408, and extended note. While pension money is exempt until it actually reaches the hands or possession of the pensioner: *Payne v. Gibson*, 5 Lea, 173; it is not so exempt after it has been received by him and by him deposited with a third person for safekeeping: *Rozelle v. Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591, and note 596. Nor is it exempt from the claims of the pensioner's creditors after it has actually come into his hands: *Friend v. Garcelon*, 77 Me. 25; 52 Am. Rep. 739; or has by him been invested in other property not itself exempt by statute: *McFarland v. Fish*, 84 W. Va. 548, 561.

GRAND RAPIDS v. NEWTON.

[111 MICHIGAN, 48.]

MUNICIPAL CORPORATIONS—UNREASONABLE ORDINANCES—DISORDERLY HOUSES.—A municipal ordinance providing that no person shall "permit drunkards, intoxicated persons, tipplers, gamblers, persons having the reputation or name of being prostitutes, or other disorderly persons to congregate, assemble, visit, or remain in his or her house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business," is unreasonable and beyond the power of the city authorities to enact, "under a charter conferring authority to prevent vice and immorality, preserve public peace, and good order, prohibit and suppress the keeping of houses of ill-fame and assignation, or for the resort of common prostitutes, or disorderly houses," for the reason that it is not limited in its application to places requiring police regulation, nor to assemblages of immoral persons, and does not make knowledge of the reputation of the persons visiting a house or place of business, or an unlawful purpose on the part of the visitor, an ingredient of the offense.

H. J. Felker, and H. Joslin, for the appellant

Lombard & Hughes, for the appellee.

⁴⁸ MONTGOMERY, J. The charter of the city of Grand Rapids confers upon the common council authority to enact ordinances: ⁴⁹ "to prevent vice and immorality, to preserve public peace and good order, and to prevent and quell riots, disturbances, and disorderly assemblages; . . . to prohibit and prevent any riot, rout, disorderly noise, disturbance, or assemblage in the streets or elsewhere in said city; . . . to prohibit, prevent, and suppress the keeping of houses of ill-fame or assignation, or for the resort of common prostitutes, disorderly houses, and disorderly groceries; to restrain, suppress, and punish the keepers thereof; . . . to provide for maintaining the peace, order, and good government of said city."

Assuming to act under this authority, by section 2 of an ordi-

nance approved July 5, 1887, it was enacted: "That no person shall permit any indecent, loud, or boisterous noise, or any fighting, quarreling, or disturbance, in or about his or her house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business, nor permit persons to congregate therein to the annoyance or disturbance of citizens or others, or permit drunkards, intoxicated persons, tipplers, gamblers, persons having the reputation or name of being prostitutes, or other disorderly persons, to congregate, assemble, visit, or remain therein."

The defendants were charged with a violation of this section, under a complaint alleging that they were keepers of a saloon in said city, and did then and there permit certain persons (naming them), having then and there the name and reputation of being prostitutes, to congregate, assemble, remain, and visit therein. The trial judge, on motion, discharged the respondents on the ground that the complaint states no offense. The city asks to have this order set aside, and that the respondents be placed on trial.

The complaint does not allege that the respondents had any knowledge of the reputation of these women, nor is knowledge of such reputation made an element of the offense by the ordinance. It is evident that the trial judge was of the opinion that this section of the ordinance ⁵⁰ is unreasonable, and beyond the power of the council to enact. We are of the same opinion. We do not hold that if the ordinance were limited in its operation to places of resort where prostitutes may be presumed to go for immoral purposes, like a liquor saloon, it may not be competent to exclude all having the reputation of being prostitutes, or that it may not be competent to require in such a case that the proprietor see to it, at his peril, that none having that reputation in fact congregate at or visit his place of business. This power to exercise stringent regulation of the liquor traffic has been frequently recognized, and arises out of the necessities of the case. The courts recognize the fact that such places furnish facilities for unlawful conduct, and hence that regulation of such business is proper, and this court would hesitate to pronounce unreasonable stringent regulations based upon the necessity of control arising out of this condition. But the difficulty is, that the ordinance in question is not limited in its application to such places of business, nor to assemblages of immoral persons. It is broad enough to render liable to its penalties a merchant at whose counter a tippler or gambler buys the necessities of life. Indeed, it might render subject to its provisions those maintaining a reformatory home for inebriates or prosti-

tutes. For, as before stated, knowledge of the reputation of the person visiting the house or place of business is not an ingredient of the offense, nor is any unlawful purpose on the part of the visitor required; and those amenable to the provisions of the ordinance are the owners or keepers of any house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business. These provisions are plainly so broad as to render the ordinance unreasonable and beyond the power of the council, and, as we are not able to sever the provisions of this section, and to know judicially that those of the provisions which might lawfully be adopted would, by themselves, have been deemed proper, we feel bound to ⁵¹ hold that the offense here charged is not created by any valid ordinance.

The judgment of the superior court is affirmed.

The other justices concurred.

MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES—DISORDERLY HOUSES.—A municipal ordinance making it a crime for "anyone knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon-droppers, bawds, prostitutes, or gamblers, or any other person, for the purpose or with the intent to agree, conspire, combine, or confederate to commit any offense, or to cheat or defraud any person of any money or property," is unconstitutional as being an invasion of the rights of personal liberty: *Ex parte Smith*, 135 Mo. 223; 58 Am. St. Rep. 576. A municipal corporation has no power to enact an ordinance punishing as a crime the mere presence in, or return to, the corporate limits, of a public prostitute, although the statute authorizes such corporation to pass ordinances to punish persons for lewd and lascivious behavior in the streets, and to suppress bawdy and assignation houses, and indecent and disorderly conduct: *Paralee v. Camden*, 49 Ark. 165; 4 Am. St. Rep. 35. See monographic note to *Robinson v. Mayor*, 34 Am. Dec. 627-643; *Milliken v. City Council*, 54 Tex. 388; 38 Am. Rep. 629.

CLARK v. O'ROURKE.

[111 MICHIGAN, 108.]

ASSOCIATIONS — UNINCORPORATED — LIABILITY OF MEMBERS.—Members of an unincorporated church organization, who are actually instrumental in incurring liabilities for it, or who either authorize or ratify its transactions or those made in its name, are personally liable therefor, while those who in no way participate in such transactions are exempt from liability.

ASSOCIATIONS — UNINCORPORATED — LIABILITY OF MEMBERS.—The members composing a building committee of an unincorporated church organization in charge of the work of constructing a church are individually liable for material furnished them for building, although it is charged to the organization and the seller was informed that the material would be paid for out of the proceeds of church fairs, voluntary subscriptions, and donations.

ASSOCIATIONS—LIABILITY OF MEMBERS—PRACTICE. If a declaration in an action against the members of the building committee of an unincorporated church association to recover for materials furnished is broad enough to include the liability of the defendants as members of the association, and also their liability as agents of a principal having no legal existence, a judgment in favor of plaintiff cannot be reversed simply because his counsel relied upon the latter theory of defendant's liability.

APPELLATE PRACTICE—NONJOINDER—OBJECTIONS.—An objection that persons, not made parties, are jointly liable with the defendant, cannot be raised for the first time on appeal.

Assumpsit, by O. M. Clark and others, forming a partnership to recover against C. O'Rourke, and others, constituting the building committee of an unincorporated church society for material furnished them with which to build a church. Such material was charged to the church association, and the defendants claimed that credit was extended to it and not to them personally, and that plaintiffs agreed to look to funds to be raised by church fairs, subscriptions, and donations for their pay. Judgment for plaintiffs, and defendants appealed.

T. B. Wilson, J. J. Patek, and F. R. Mechem, for the appellants.

Hill & Rood, for the appellees.

112 GRANT, J. The church organization had no legal existence. It could neither sue nor be sued. The members of the society were not partners. Those of the society who were actually instrumental in incurring the liabilities for it are liable as either principals, or agents having no legal principal behind them. Members of the society who either authorized or ratified the transactions are liable, while those who did not are exempt from liability: 1 Bates on Partnership, sec. 75; Ash v. Guie, 97 Pa. St. 493; 39 Am. Rep. 818; Fredendall v. Taylor, 26 Wis. 286. Many other authorities might be cited, but we refrain from doing so, since defendants concede the law.

The testimony does not justify the conclusion that the plaintiffs agreed to trust to the proceeds of fairs, et cetera, for their pay. Plaintiffs knew that the society as a society was irresponsible. It was entirely natural that they should inquire the methods by which the money should be raised, but no inference can be drawn from it that they agreed to look to this source alone. Should A loan B one hundred dollars, and B promise to raise wheat on his farm with which to pay it, B would not be relieved from payment because he raised no wheat.

Neither can we accede to the proposition that there was evi-

dence tending legitimately to show that the credit was given to this unincorporated and irresponsible society. It was natural that plaintiffs should enter the account upon ¹¹³ their books as they did, but a jury would not be justified in drawing the conclusion from this alone that they agreed to look to such members of this society as they might be able to show authorized or ratified the purchase from them. In both reason and authority, this is of no particular significance. The alleged principal was a myth, and the entry means no more than that the credit was given to those forming the association, or to those who stood sponsors for it, and were conducting its business and obtaining the credit: *Lewis v. Tilton*, 64 Iowa, 220; 52 Am. Rep. 436; *Winona Lumber Co. v. Church*, 6 S. Dak. 498; *Davison v. Holden*, 55 Conn. 103; 3 Am. St. Rep. 40. These defendants were the active managers, and, with the other two members of the committee, were in sole charge of the work, and, under the law and the facts, were properly held responsible. The law does not, under such circumstances, leave the creditors to search out the individual members of the society who have authorized the transaction, but holds those liable who have dealt with the creditors in the capacity of agents or principals.

The declaration is upon the common counts, and the plea is the general issue. The declaration, therefore, includes the liability of the defendants as members of the society, and their liability as agents of a principal having no legal existence. While counsel, in their opening statement to the jury, appear to have relied upon the latter liability, still we should not feel disposed, under the facts of this case, to reverse the judgment, even if defendants were not liable upon this theory. There is no doubt of their liability upon the former theory, and it would be technical and unjust to reverse the judgment, and put the plaintiffs to the expense of a new trial, for no other reason than that counsel did not state their case as broadly as they might.

Defendants cannot now raise the question that others, not made parties defendant, are jointly liable with them. If they desired to raise this question, they should have ¹¹⁴ interposed a plea in abatement: *Robinson v. Robinson*, 10 Me. 240.

The judgment is affirmed.

The other justices concurred.

ASSOCIATIONS — VOLUNTARY AND UNINCORPORATED—
LIABILITY OF MEMBERS.—There is no community of interest for business purposes among the members of a voluntary association; and therefore no member as such is liable for debts or other obliga-

tions incurred by any other member, or by an officer or committee of the association, although the officers or members of a committee who concur in ordering goods, or who enter into contracts generally for the benefit of the associations, are personally liable. Any member of the association, however, may become liable on such a contract or indebtedness if he previously assents to, or subsequently ratifies, the same. In other words, the question is one of agency, and not of partnership, and the agency must be established by him who relies upon it, and will not be inferred from the mere fact of membership in the association: See monographic note to *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 161, 162. But compare *Lynch v. Postelthwaite*, 7 Mart. 69; 12 Am. Dec. 495, and note; *Cheeny v. Clark*, 3 Vt. 431; 23 Am. Dec. 219; *Fredendall v. Taylor*, 23 Wis. 538; 99 Am. Dec. 203.

PHILLIPS v. DETROIT, GRAND HAVEN, AND MILWAUKEE RAILWAY COMPANY.

[111 MICHIGAN, 274.]

RAILROADS—CROSSINGS—DUTY TO LOOK AND LISTEN.—A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing, as well as of sight, and, if either sense cannot be rendered available, the obligation to use the other is stronger, to ascertain, before attempting to cross, whether a train is in dangerous proximity, and if he neglects to do this and ventures blindly upon the track without any effort to ascertain whether a train is approaching, it must be at his own risk, and he cannot recover for an injury thus received.

RAILROADS — CROSSINGS — CONTRIBUTORY NEGLIGENCE BY DEAF PERSON.—A deaf man who drives upon a railway track at a crossing without stopping to look for an approaching train is guilty of negligence barring a recovery, and his contributory negligence is not excused by the fact that his view of the track is obstructed, if he could have seen it by standing up in his buggy, although another vehicle had crossed in safety some distance ahead of him, and although it was not usual to a train to pass on that particular day or at that hour.

V. H. Smith, and Clute & Clute, for the appellant.

L. C. Stanley, E. W. Meddaugh, and Geer & Williams, for the appellee.

275 LONG, C. J. This action is brought to recover damages for an injury to the plaintiff by a passenger train at a highway crossing on the defendant's road. On Sunday, June 4, 1893, a washout had occurred on the Chicago & Grand Trunk Railway, between Lansing and Durand, so that the through passenger train from Chicago eastward was taken from Lansing to Ionia, thence eastward to Durand, over the defendants' road, passing through the village of Muir, where the accident happened. The train passed the station at Muir without stopping, a little

past noon, running at a rapid rate of speed, the witnesses varying in testimony in regard to it; some stating the rate as high as forty-five miles an hour, and others about twenty miles. It was an irregular excursion train. Three blocks east of the depot, and about eleven hundred and seventy feet distant, the train passed over Plain street at a grade. The plaintiff, a man about sixty-seven years of age, quite deaf, lived at Portland, about seven miles from Muir, and on that morning, traveling from his home to Carson City, passed through the village of Muir. He entered the town from the south side on Prairie street, and turned eastward into Superior street, which is parallel with the track of defendant's road, and about two hundred feet distant from it. He traveled along Superior street about eleven hundred and seventy feet, when he turned northward into Plain street. No train was in sight when he turned into Plain street. He was riding in a single carriage, with the top up and side curtains off, drawn by one horse, which was gentle and steady. Driving northward along Plain street, his view was for the most part obstructed, first by a ²⁷⁶ dwelling-house, then by some bushes, a henhouse, and a pile of ties, the ties extending up to within six or eight feet of the railroad track. The henhouse was about six feet high, and the ties, at the utmost, were only nine feet high. The plaintiff did not stop his horse, but drove along to a point past the pile of ties, when, looking westward, he saw the train approaching, about seventy feet distant from him. His horse was then upon the track. He drove across, and the train caught the carriage, overturning it, and injuring the plaintiff severely, as well as damaging his horse and carriage. The negligence charged is: 1. That the defendant, by allowing the ties to remain there, and obstruct his view, led him into a place of danger; 2. That it failed to provide a watchman; 3. That the train was running at an unlawful rate of speed, and without sounding the bell or whistle; 4. That the defendant had no right or authority to run the train on Sunday.

At the close of the case, the court below directed verdict and judgment in favor of the defendant. Plaintiff brings error.

From the record it is apparent that the plaintiff took none of the precautions which the law requires of one who is about to cross a railroad track. Some claim is made that Stoddard, who was in advance of the plaintiff, passed over the track in safety, and that the plaintiff had the right to rely upon that fact, and was thereby not required to take the same precaution which he otherwise would; but it appears that Stoddard was

greatly in advance of plaintiff, and had turned the corner off Plain street, a distance of nearly one hundred and seventy-five feet, before the plaintiff reached the crossing; and it does not appear that plaintiff in any manner relied upon the fact that Stoddard had passed safely over: *Jensen v. Michigan Cent. R. R. Co.*, 102 Mich. 176; *Houghton v. Chicago etc. Ry. Co.*, 99 Mich. 308. The plaintiff, if he could not see an approaching train by reason of these obstructions, was bound to use greater precautions²⁷⁷ in nearing the track. A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and, if either sense cannot be rendered available, the obligation to use the other is stronger, to ascertain, before attempting to cross, whether a train is in dangerous proximity; and if he neglects to do this, but ventures blindly upon the track, without any effort to ascertain whether a train is approaching, it must be at his own risk. This is the general rule settled in this state, but modified by the proposition that he is not bound to the same degree of care where he has no reason to expect a train to pass at that time: *Lake Shore etc. Ry. Co. v. Miller*, 25 Mich. 274; *Guggenheim v. Lake Shore etc. Ry. Co.*, 66 Mich. 150. But the law requires a person to exercise a great degree of care in making these crossings. The track itself is a warning of danger; and, if one goes upon it heedlessly, he assumes the risk incident thereto. Here the plaintiff was quite deaf. It is apparent that he could not hear the noise of the train. He knew the track was there; was familiar with the road. He could not see because of these obstructions, and yet he did not stop or take any other precaution to ascertain if a train was approaching. He had no right to rely upon the fact that it was Sunday, and that no train was likely to approach, and drive blindly on. He must exercise some care. We are unable to find that he exercised any, even the slightest, care. If he had stood up in his carriage, and looked westward, he could have seen over the henhouse and the pile of ties, and have seen the train when it was some twelve hundred feet away. He did not stop, and, if he had, he was, it appears, too deaf to hear the rumbling of the train. The case, it seems to us, is one where the plaintiff was so manifestly guilty of contributing to his own injury that a recovery should not be permitted.

In *Shufelt v. Flint etc. R. R. Co.*, 96 Mich. 327, it appeared that, if Mrs. Shufelt had stopped eighteen or twenty feet from the crossing, she could have seen the train. Mr. Justice²⁷⁸ Hooker in that case, speaking for a majority of the court, said:

"It was her duty to look both ways, after getting where she could see, before venturing upon the track, and she should have taken sufficient time to do so, though it became necessary to stop her team for the purpose. . . . A person is not justified in driving upon a straight track in the face of an approaching train without looking for it, and obstructions to the view in proximity to the track increase the obligation to extreme caution."

The present case, upon its facts, shows more clearly the obligation resting upon the plaintiff, for not only was his view obstructed, but he was very deaf. Whatever view may be taken of the testimony, giving it all the latitude claimed by counsel for plaintiff, it is difficult to find in it any proof of care or caution taken by plaintiff, as he ran blindly into danger.

The contention of counsel that this was a Sunday excursion train, and unlawfully run, we think, can have a bearing only upon the question as to whether the plaintiff would not be required to exercise the same care in making the crossing. If he was not expecting a train, or had a right to assume that no train ever ran on Sunday over that road, and he was relying upon that fact, it might, in a sense, excuse him from that degree of care that otherwise he was bound to exercise. But it is apparent from the record that, if the plaintiff had that in view, he did not take the precautions which the law requires, for even under such circumstances he had no right to go blindly upon the track. But, though it is the exception on that road to run Sunday trains, yet excursion trains frequently go over the road on Sunday.

The judgment must be affirmed.

The other justices concurred. .

RAILROADS—CROSSINGS—DUTY TO STOP AND LISTEN—DEAF PERSONS.—A railroad track is of itself a warning of danger to all who go upon it: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804. The simple fact that the hour or one of the regular trains has passed, and that it is not yet time for another to pass, does not justify a belief that no train is likely to pass, nor relieve one about to cross the track from the duty to stop, look, and listen, before going upon it: *Vincent v. Morgan's etc. R. R. & S. S. Co.*, 48 La. Ann. 933; 55 Am. St. Rep. 287, and note; and greater care is required where a view of the track is partially obstructed: Note to *Mynning v. Detroit etc. R. R. Co.*, 8 Am. St. Rep. 814. A deaf person is guilty of negligence who attempts to drive an unmanageable horse across a railroad track when a train is approaching. It is his duty to keep a vigilant lookout to see and avoid the danger: *Illinois Cent. R. R. Co. v. Buckner*, 28 Ill. 299; 81 Am. Dec. 282. See *Chicago etc. R. R. Co. v. Still*, 19 Ill. 499; 71 Am. Dec. 236; monographic note to *Ernst v. Hudson River R. R. Co.*, 90 Am. Dec. 783.

CHURCH v. HOWARD CITY.

[111 MICHIGAN, 298.]

NEGLIGENCE — CONTRIBUTORY — PEDESTRIAN ON SIDEWALK.—A person perfectly familiar with the situation, and knowing the danger, who is injured while passing along a sidewalk on a dark night by falling into an excavation from the side of the walk unguarded by a rail, is guilty of negligence, and cannot recover if he contributes to his injury by making a mistake and following a false light instead of the one he is accustomed to follow, instead of guiding himself by the rail on the opposite side of the walk.

NEGLIGENCE—CONTRIBUTORY.—A city, though guilty of negligence in leaving one side of a sidewalk unguarded by a rail, is not liable for an injury to a pedestrian familiar with the situation, caused by his own mistake, without which he would not have been injured, in walking off the unguarded side of the walk.

Action to recover for personal injury, caused by negligence. The village of Howard City, some six months before the accident complained of, constructed a plank sidewalk along a street and opposite to some vacant lots. It constructed a rail along one side of walk next to the vacant lots, but left the side next the street unguarded. The plaintiff, after leaving his shop, and while passing along such walk on a very dark night, as was his custom, guided his course over the walk by a light which was usually burning in the house of one Denton. On the night of the accident, the plaintiff was guided by what he supposed to be the Denton light, but which proved to be in another house, and, taking no other precaution, he walked toward the false light, stepped off the walk into an excavation, and was severely injured. The negligence charged was the failure to construct a railing on both sides of the walk. Judgment for plaintiff, and defendant appealed.

Fitzgerald & Barry, O. J. Wolfe, and F. A. Stace, for the appellant.

Ellsworth & Rarden, and C. W. Perry, for the appellee.

299 GRANT, J. The court should, as requested, have directed a verdict for the defendant. Plaintiff was not in the exercise of ordinary care. He was perfectly familiar with the situation, and knew the danger. He chose to direct his course by a light which was not the one he supposed it to be. It is doubtful whether, at the point where he selected this light as his guide, he could have seen the light in Denton's house if it had been there, on account of an angle in the ³⁰⁰ street. His counsel in their brief say: "It is absolutely certain that, had

there been a railing there, he would not have fallen off." It is equally certain that, if he had guided himself by the railing upon the north side, he would have passed over in safety. It may be said that three things contributed to the accident—the darkness of the night, the mistake of the plaintiff in taking one light for another, and the absence of a rail on the south side. His own mistake caused the accident, and for this the defendant cannot be held liable, however negligent it may have been in leaving one side of the walk unguarded. Had there been no light, it would clearly have been his duty to guide himself by the rail on the north side. He cannot avoid this duty by showing that he followed a false light, instead of the one he was accustomed to follow. The village was in no wise responsible for his own mistake, without which he would not have been injured. Further discussion is unnecessary. The case is ruled by *Black v. Manistee*, 107 Mich. 60. In that case plaintiff neglected to guide herself by the handrail when passing over an icy sidewalk: See, also, *Smith v. Jackson*, 106 Mich. 136; *Kuhn v. Walker Tp.*, 97 Mich. 306; *Beach on Contributory Negligence*, sec. 248.

Judgment reversed, and no new trial ordered.

The other justices concurred.

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES BY DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.—Previous knowledge by a person injured of the existence of a defect in a sidewalk does not per se establish negligence on his part: *Russell v. Monroe*, 116 N. C. 720; 47 Am. St. Rep. 823; though it is competent evidence on the question of his contributory negligence: *McQuillan v. Seattle*, 10 Wash. 464; 45 Am. St. Rep. 799. Having such knowledge, he is bound to use more care in passing over it than if he had been without it, but is not bound to use extraordinary care: *McQuillan v. Seattle*, 10 Wash. 464; 45 Am. St. Rep. 799. To bar a recovery for injury, his contributory negligence must be one of the efficient causes of the accident, and not a mere condition or occasion of it: *Cleveland v. Bangor*, 87 Me. 259; 47 Am. St. Rep. 326. See extended note to *Henry County Tp. Co. v. Jackson*, 44 Am. Rep. 276-279; monographic note to *Browning v. Springfield*, 63 Am. Dec. 350-357.

TURNER v. ST. CLAIR TUNNEL COMPANY.

[111 MICHIGAN, 578.]

CONFLICT OF LAWS—NEGLIGENCE.—The law of Canada governs the liability of a corporation engaged in constructing a tunnel between Michigan and Canada for an injury to its employé sent by the foreman in Michigan from that side to the Canadian side or end of the tunnel to work in compressed air at a higher pressure than he was accustomed to work in, when the action is based

on an alleged wrong in putting him at dangerous work without warning him of the increased danger and while he was in ignorance of such danger, known, or which should have been known to the master.

Geer & Williams, L. C. Stanley, and E. W. Meddaugh, for the appellant.

Chadwick & McIlwain, for the appellee.

⁵⁷⁹ HOOKER, J. The defendant is a corporation, and was engaged in constructing a tunnel under the St. Clair river between Fort Gratiot, Michigan, and Port Sarnia, Ontario. Compressed air was used to prevent caving, access to the tunnel being had through an air lock, in which the air was made to correspond in density with that in the tunnel, or with that of the atmosphere outside, by the use of valves. Letting air into the lock from the tunnel accomplished the former, and allowing it to escape outside from the lock effected the latter. It was known by defendant that those who entered the tunnel experienced an inequality of air pressure, which, for a time at least, caused an unpleasant pressure from the outside upon the eardrums, and perhaps a similar pressure from within upon going out. It was also known that after going out some persons were attacked with violent pains in the members and joints, which, among the men, at least, went by the name of "the bends." It is, perhaps, not improper to say that these were more common among beginners in work in compressed air, and that it was generally understood that they might be avoided, or at least that the danger of their occurring might be greatly lessened, by changing the pressure gradually and slowly in the lock. It was shown that the practice of the company was to require an examination by a surgeon of the men employed, to ascertain that they were in a proper physical condition to make it prudent for them to work in compressed air. This tunnel was constructed by starting a drift from each side of the stream, and each ⁵⁸⁰ had its overseer or superintendent, though both were under one management. Mr. Hobson was chief engineer, Murphy had charge of the excavation, and Eames was in charge of the mechanical work and the working of the machinery. Minto was assistant to Eames, and looked after work at the Canadian end. Hushin was employed by Eames as mechanical foreman on the Michigan side. The plaintiff was employed by Hushin, and first worked outside as a laborer, but was desirous of getting a job where he could draw more pay, which seems

to have been understood to mean that he applied for work inside, and he was finally given such work, and worked a day, or perhaps two, before the occurrence which gave rise to this action. After the plaintiff commenced work in compressed air, he and three or four others were requested or directed by Hushin to go to the Canadian side to work, and to report to Minto, which they did, and they were set at work in the tunnel, where, after working eight hours, they were persuaded by the overseer in charge to remain for another shift of eight hours. At the end of that time they came out through the lock. They started for the Michigan side, but, before getting across the river, the plaintiff was attacked by "the bends," and had to go home. He became unconscious, and when he recovered consciousness he found that he had lost his hearing altogether. There was testimony from experts tending to show that they had many patients whose ears were temporarily affected by work in compressed air, but it is claimed that it was shown that, up to the time of plaintiff's experience, no case of total deafness or permanent injury to the ears had fallen within the observation of the defendant or any of the witnesses. This action was brought, charging the defendant with negligence, and plaintiff recovered a verdict and judgment, which the defendant has brought to this court by writ of error.

There was evidence tending to show that, shortly before the plaintiff was ordered to go to the Canadian side, some difficulty had occurred there, owing to a stratum or pocket ⁵⁸¹ of loose soil, which threatened to cave and let the water into the tunnel, which would have been a serious damage, if it had not made abandonment of the enterprise necessary; that, to prevent it, the air pressure had been increased, and that, owing to a reluctance to work under such pressure, most of the men had quit work, and it was difficult to secure others to take their places. Whether this was from fear of injury from work in the air, or from a lack of faith in the efficacy of the air, and a fear that the water would get in and drown them, is, perhaps, not altogether clear; but, at all events, men were needed, and were sent from the Michigan side. The plaintiff testified that he told Hushin that he did not want to go, because he had heard that they were working over there in a pressure of twenty-eight pounds, and that the men agreed that they would not work in that pressure, and that Hushin denied it, saying there was only nineteen or twenty pounds, and said: "Go over there, and stay until 8 in the morning, and that won't hurt anybody, and come out and

bring a good record back"; that, upon that assurance, they went. There was testimony tending to show that the pressure carried that night was from twenty-six to twenty-eight pounds, and Hushin testified that he knew it was twenty-six pounds when he sent the men over. The plaintiff also testified that he informed Hushin that he was fatigued, and needed sleep, and that Hushin replied that he could sleep to-morrow. It also appeared that the men went in at 4 o'clock, and at 12 they prepared to go out, but, on solicitation of the overseer in charge of the work inside, who said he would be without men if they did not stay, and that it would not hurt them to stay until morning, they remained. There was testimony that they were from one and a half to five minutes in going through the lock.

The court instructed the jury that: "Fearing that I may not have made it sufficiently specific, I desire again to repeat the proposition to you that this plaintiff cannot recover, unless he shows, by a fair ⁵⁸² preponderance of evidence, to your satisfaction: 1. That the use of compressed air in the manner in which it was used on the Canadian side was dangerous; 2. That the defendant knew it when it directed Turner to go to work, or that it should have known it by the exercise of reasonable care and caution through its officers, superintendents, and foremen; 3. That Turner was ignorant of the danger; 4. That the danger was latent, or, in other words, concealed and hidden; 5. That the plaintiff did not know of this concealed or hidden danger; 6. That he was not cautioned by the tunnel company, or its officers or foremen, who employed him, of this danger, and that he did not know it from any other source; and 7. That his injury was caused by working in compressed air, and that while he was doing that he was in the exercise of due care and caution. Each one of these, I repeat, must be proven to your satisfaction before the plaintiff can recover."

It is contended by the defendant: 1. That this injury to the plaintiff was not to have been anticipated, reasonably, so as to lay a duty on defendant to avoid it by warning him. There was no latent danger which the defendant knew, or ought to have known. 2. That the acts of Hushin and Minto and the overseer in the tunnel were the acts of fellow-servants. 3. That the defendant was not obliged to make the place of labor safe, under the rule laid down in *Beesley v. Wheeler*, 103 Mich. 196, and *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463; 58 Am. St. Rep. 505. 4. That the work was voluntarily performed in Canada,

and that the case is governed by a law of the province, which does not permit a recovery.

At the threshold of the case lies the fourth question mentioned, because, if it is true that under the law of Canada there could be no recovery, it is the end of the case, unless it can be said that the law of Michigan governs. In support of their contention counsel for the defendant cite a number of cases where wrongs were perpetrated in foreign states; such wrongs as assaults and batteries, malicious arrests and prosecutions, and false imprisonment, injuries to passengers and employes on railroads, et cetera. In all of these cases the rule is said to ⁵⁸³ be that the action for the wrong is transitory, but that the right of recovery depends upon the law of the place where the tort is committed. In this case the alleged wrong consisted in allowing the plaintiff to enter upon a dangerous work, in ignorance of dangers known, or which it is said the defendant should have known, whereby the plaintiff was injured. This occurred in Canada, and we are of the opinion that the case falls within the authorities mentioned, which will be found cited in the briefs of counsel. Counsel for the plaintiff claim that the breach of duty occurred in the United States, by the defendant falsely assuring the plaintiff that the employment was safe. Continuing, they say: "There are two elements necessary to constitute liability for negligence, viz., wrong and injury. Neither, alone, is sufficient. While it is true that negligence without injury gives no right of action, it is equally true that injury without negligence gives no right of action. The action is based on negligence. Negligence is simply a neglect of duty. That neglect of duty constitutes the 'wrong' which gives the right of action, which is founded upon the application of the general principle of law that 'where there is fault there is liability.' The breach of duty, the fault, and wrong were all on the American side. Upon these plaintiff's right of action is founded. The injury is but the result of the breach, the fault, and the wrong. The injury alone created no liability. It is defendant's connection with, and responsibility for, the injury which makes it liable, and that responsibility was fixed upon defendant when it gave the wrongful order which resulted in the injury. None of the cases cited by defendant are authority for the case at bar. They do not contain the initial wrong by the master to the servant injured which creates the right of action, viz., the deceit and wrongful order. They are all cases where the tort was committed in some foreign country or state. In this case the tort

was committed on the American side, and committed by the master."

If it is true, as counsel concede, that the liability rests upon the concurrence of an injury and a neglect of duty, ⁵⁸⁴ without which neglect the injury would not have occurred, the tort cannot be said to have been committed in Michigan, and it can be said to have been done in Canada, where the dangerous service began when the plaintiff entered the dangerous place without warning, and which warning up to that time might have been given by the master or any other person. If, before he incurred the risk, knowledge of the danger came to the plaintiff in any way, or from any source, there would have been no actionable wrong. Counsel have not cited an authority for the position taken, and we think, as already stated, that the law of the place of the injury as to the duty of the master must apply: See *Wingert v. Wayne Circuit Judge*, 101 Mich. 395; 3 *Sutherland on Damages*, section 1280. The trial court reached a different conclusion upon this troublesome question, and we are constrained to hold that therein he erred. The importance of this ruling is seen in the following statement of the question involved: For plaintiff it was asserted that it was the duty of the master to warn the plaintiff that an increased and higher pressure was maintained in the Canadian than in the Michigan tunnel, where the plaintiff had worked, and that this increased the danger; also that it was dangerous to work for twice the usual time in this high pressure, and that greater deliberation in passing the lock in such case was necessary to safety. If the Michigan rule was to be applied, giving notice of the danger was a duty of the master, which he could not escape by authorizing a representative to perform it; while, if the Canadian rule governed, it was claimed that the master might safely leave that to a competent foreman, his duty being discharged by the exercise of due care in the selection and employment of such foreman. From the evidence offered, such would seem to be the law in Canada, and the injury to the defendant's case by the ruling is manifest.

We think it unnecessary to discuss the large number of questions raised by this record, most of which turn upon ⁵⁸⁵ legal principles repeatedly considered by us, and upon which we see no reason for anticipating difficulty upon another trial.

The judgment is reversed, and a new trial ordered.

The other justices concurred.

NEGLIGENCE—CONFLICT OF LAWS.—There can be no recovery in one state for injury received through negligence in another,

unless the infliction of injury is actionable under the law of the state where it is sustained: Alabama etc. R. R. Co. v. Carroll, 97 Ala. 126; 38 Am. St. Rep. 163, and note; Higgins v. Central etc. R. R. Co., 155 Mass. 176; 81 Am. St. Rep. 544, and note.

SCHAFFER v. HAUSER.

[111 MICHIGAN, 622.]

ADVERSE POSSESSION UNDER PAROL GIFT—MORTGAGE BY DONOR—STATUTE OF LIMITATIONS.—Possession of land by a donee under a parol gift, accompanied by a claim of ownership, is adverse to the donor, and the execution of a mortgage by the latter after such entry by the donee does not change the character of his holding nor operate to suspend the running of the statute of limitations in his favor.

H. M. Duffield, for the appellant.

J. H. Pound, for the appellees.

622 MOORE, J. This is an action of ejectment, brought to recover the possession of certain lands which the plaintiff claimed to own. Bernard Stroh was the owner of these lands prior to 1870. In 1873 he made a mortgage upon these lands and other lands to Michael Markey, which matured in three years. This mortgage was foreclosed, and a sheriff's deed made upon foreclosure to Ervin Palmer, which deed was dated February 15, 1884. February 18, 1884, Ervin Palmer and wife deeded these lands to the Lion Brewing Company, which company deeded them to the plaintiff in the case, who is a daughter of **623** Bernard Stroh, deceased. The defendant is a brother in law of Bernard Stroh, deceased, and had some business relations with him. It is the claim of the defendant that in 1870 Bernard Stroh gave him, by parol, the property in controversy, and put him in possession of it in 1870, and that he had been in the possession of it from that time until the commencement of this proceeding, claiming to be the owner of it. The case was tried by a jury, who found the claim of the defendant to be true, and returned a verdict in favor of the defendant. The plaintiff brings error.

The questions involved are purely law questions. It is the claim of the plaintiff that the possession of Hauser, under a parol promise to give him the property, could not be the foundation of any adverse possession; that Hauser would be only a tenant at will. It is also the claim that, under this parol promise, Hauser was a privy of Stroh, and that, as a privy of the mort-

gagor, he could not assert adverse possession against the mortgagee.

We think the weight of authority is against these propositions. In 1 American and English Encyclopedia of Law, 280, it is said: "Possession of land by a donee under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, which, if continued without interruption, is protected by the statute of limitations, and matures into a good title. That such a parol gift conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar is complete, is immaterial. It is evidence of the beginning of an adverse possession by the donee, which can only be repelled by showing a subsequent recognition of the donor's superior title."

This statement of the law is fully supported by *Campbell v. Braden*, 96 Pa. St. 388; *Stewart v. Duffy*, 116 Ill. 47; *Bartlett v. Secor*, 56 Wis. 520; *Clark v. Gilbert*, 39 Conn. 94; *Collins v. Johnson*, 57 Ala. 304; *Vandiveer v. Stickney*, 75 Ala. 225. Justice Shaw states the law to be: ⁶²⁴ "A grant, sale, or gift of land by parol is void by the statute. But, when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner, and not as tenant; and it equally proves an admission on the part of the donor that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the statute, but which the parties, by mistake, believe good. The possession of such grantee or donee cannot, in strictness, be said to be held in subordination to the title of the legal owner; but the possession is taken by the donee as owner, and because he claims to be the owner; and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession; but until he does this, by entry or action, the possession is adverse. Such adverse possession, continued twenty years [the time then required by the Massachusetts statute], takes away the owner's right of entry. . . . It is enough for the decision of this case that the tenant had the actual, exclusive, and adverse possession of the estate more than twenty years, by which the owner, and all persons claiming under him, were barred of their entry and right of action": *Sumner v. Stevens*, 6 Met. 337, 338. For cases involving the doctrine of adverse possession, see *Bower v. Earl*, 18 Mich. 367; *Campau v.*

Lafferty, 50 Mich. 114; Toll v. Wright, 37 Mich. 93; Murray v. Hudson, 65 Mich. 670; Whitaker v. Erie Shooting Club, 102 Mich. 454.

It is the claim of plaintiff that, as she derived title through the foreclosure of the Markey mortgage, her right of action is saved to her by section 8506 of 2 Howell's Statutes, which provides that a purchaser at a foreclosure sale shall be vested with "all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter." It is her claim that, at the time the mortgage was made, the mortgagor had the legal title to the land, and that the statute of limitations would not run against the mortgagee until the ⁶²⁵ mortgagee had a right of action against the one in possession of the land, and that this would not accrue until the mortgage had been foreclosed and the equity of redemption had expired. It becomes necessary to inquire what right, title, and interest Bernard Stroh had in the land when he made the Markey mortgage. Under the finding of facts by the jury, it is evident the defendant went into possession of the land in 1870, under a parol gift, and, claiming to be the owner, was holding adversely to Bernard Stroh. The latter had the legal title, and the right to assert it against the defendant Hauser, either by entry or by bringing action, within fifteen years from the commencement of adverse possession by Hauser. If he failed to take action before the time limited by the statute expired, he lost his right of entry, and Hauser acquired the legal title to the land. This was not done by him or any persons claiming under him. We cannot subscribe to the contention that a mortgagee can assert a right against one in possession of land holding adversely that could not be asserted by the mortgagor if the mortgage had not been made. To do so would be to hold that the owner of the legal title could at any time suspend the running of the statute of limitations by simply executing a mortgage payable at some time in the future.

The other assignments of error have been considered, but it will not be necessary to discuss them here.

Judgment is affirmed.

The other justices concurred.

ADVERSE POSSESSION—ACT OF OWNER INTERRUPTING POSSESSION OF DISSEISOR.—A conveyance of land to another while it is in the adverse possession of a third person, under claim of ownership, though made by the rightful owner, where the act of giving the deed is unaccompanied by an entry, is absolutely void as against such adverse holder or his privies: See monographic

note to Peabody v. Hewett, 83 Am. Dec. 499, as to what entry by the owner of realty will terminate adverse possession and vest seisin in him: See Schwartz v. Kuhn, 10 Me. 274; 25 Am. Dec. 239. Such deed conveys no title: Parker v. Proprietors, 8 Met. 91; 37 Am. Dec. 121; Edgerton v. Bird, 6 Wis. 527; 70 Am. Dec. 473, and note. Contra, Cresinger v. Welch, 15 Ohio, 156; 45 Am. Dec. 565. Adverse possession is the subject of a monographic note to De Frieze v. Quint, 28 Am. St. Rep. 158-162.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

BATES v. HAMILTON.

[144 MISSOURI, 1.]

RES JUDICATA.—If suit to have a judgment set aside on the ground of fraud has been decided against the defendant, a demurrer, in a collateral proceeding, to his defense, setting up the same fraud, is properly sustained.

JUDGMENTS—VACATING FOR FRAUD.—In order to set aside a judgment alleged to have been obtained by fraud, it must appear that fraud was practiced in the very act of obtaining it. The fact that the judgment was based on a deed afterward found to be a forgery, is not sufficient to vacate it for fraud, unless that defense was prevented by fraud at the time that the judgment was obtained.

COTENANCY—PARTITION—OUSTER—LIABILITY FOR RENTS.—If neither cotenant occupies the common property for his own use, and one of them rents it, or any part of it, to third persons and collects the rents, or if he denies the right of the other to a part thereof, and thereby, pro tanto, ousts him, an accounting may be had in a suit for partition, if there is anything due at the time that suit is begun and such relief is asked at that time, and, if not, a suit in equity for an accounting may be maintained after the termination of the partition suit.

COTENANCY—RIGHTS TO RENTS.—The rights of cotenants to accruing rents, issues, and profits, from the common property, do not depend upon an express contract between them. They attach as incidents to their ownership of the res.

COTENANCY—LIABILITY FOR RENTS—ACCOUNTING.—If one tenant in common collects rents from the common property, he becomes a trustee of the amount collected for the benefit of all the tenants in common, in the proportion of their respective holdings, and a proceeding in equity for an accounting is a proper remedy, if the rights of the other tenants are denied, or if the tenant refuses to give them their respective shares.

COTENANCY—LIABILITY FOR RENTS AND INTEREST.—If a cotenant collects the rents arising from the common property, and refuses to pay any part of them over to his cotenants for a long time, he is liable for interest thereon from the time he collected them, although he has made no interest himself.

COTENANCY—MANAGEMENT OF PROPERTY AS TRUSTEE.—If a cotenant, as trustee of the common property, exercises proper diligence, and acts upon the advice of counsel, he is not liable for losses occurring from matters as to which it is doubtful what the law really is.

COTENANCY—MANAGEMENT OF PROPERTY AS TRUSTEE.—A cotenant, as trustee of the common property, is not liable for losses thereto, if he acts in good faith, and exercises such care as an ordinarily prudent man would employ in the management of his own affairs.

COTENANCY—PAYMENT OF TAXES—REIMBURSEMENT.—Upon the death of one of two cotenants, it is the duty of the survivor to pay the taxes for the current year assessed against the common property, and the probate court must give him credit for one-half of the amount paid, against the estate of the deceased.

J. F. Pitt, for the appellant.

M. A. Reed, and B. R. Vineyard, for the respondents.

¶ **MARSHALL, J.** This is a suit in equity for an accounting, growing out of the following facts: Prior to July 29, 1889, defendant and his brother John L. Hamilton owned certain lands as tenants in common; on that date John executed and delivered to his nieces, Isabel A. Bates and Susan J. McLean, a deed to his undivided share of the property, and on the 2d of August following he died. Up to the death of his brother, defendant collected the rents and paid over monthly to his brother one-half thereof. On September 7, 1889, defendant commenced a suit for partition, and made his sister, Eliza H. Strong, and these plaintiffs parties defendant. He alleged that the deed from his brother to these plaintiffs was procured by fraud and undue influence, asked that it be set aside, and the property partitioned between himself and his sister Mrs. Armstrong—three-fourths to him and one-fourth to her. The defendants in that case answered jointly, set up the deed to these plaintiffs, and claimed that one-half of the land belonged to these plaintiffs by virtue of said deed. The reply reiterated the claim of the petition. The circuit court ordered the deed canceled and made partition of the property as claimed in the petition, giving this defendant three-fourths and ⁸ his sister, Mrs. Armstrong, one-fourth. The defendants in that suit (the sister and nieces) appealed to this court. After this decree, to wit, on the 1st of March, 1891, this defendant notified Mrs. Armstrong that he would not collect the rents as to the one-fourth set apart to her in partition, and these plaintiffs, with her consent, collected them, but this defendant continued to collect the rents accruing from the three-fourths allotted to him. On the 5th of March, 1894, this court reversed the

judgment of the circuit court and remanded the case, with directions to the lower court to enter a decree giving this defendant one-half, and the other half to be allotted to these plaintiffs in equal parts: *Hamilton v. Armstrong*, 120 Mo. 597. At the January term, 1895, of the circuit court a decree was entered in conformity to the judgment of this court. On the 25th of February, 1895, this defendant instituted suit against these plaintiffs, asking to have the judgment in the partition suit set aside and vacated because it was obtained by fraud, in that it was based upon a forged deed from John L. Hamilton to them. On the 30th of March, 1895, this suit was begun. The facts above set out were stated in the petition (except the institution of the suit to vacate the decree in partition), and it was admitted that these plaintiffs had collected \$12,851.85 from the one-fourth of the property set apart to them in the original partition, and had expended for taxes, repairs, et cetera, \$3,830.68, and averred the defendant had collected \$75,000 from the three-fourths of the property set apart to him in the original partition, had received \$8,000 interest on the rents collected by him, had used the rent money in his own business and for his own purposes, deriving \$8,000 interest therefrom, and that the use of said money was worth the legal rate of interest, and asked judgment for one-half of the whole sum, less what they had ⁹ received from the rents arising out of the one-fourth aforesaid, making \$41,389.41, for which they asked judgment. The petition also prayed for an accounting which it was alleged the defendant refused to make.

The answer is in three parts: 1. A general denial; 2. That the decree in partition was obtained by fraud, in that the deed on which it was based was a forgery, which defendant did not discover until after the reversal of the judgment by this court of the original decree in partition, and an averment that as soon as it was discovered, and during the same term, he filed a motion in this court to have the judgment modified so as to permit him to avail himself of the defense of forgery in that case in the lower court, but that his application was denied by this court, and hence he prayed that the decree in partition be vacated because founded on a forged deed; and, 3. The pendency of his suit to vacate the decree, which he alleged would settle every issue in this case. The plaintiffs demurred generally to the second and third defenses, and also specially because Mrs. Armstrong was a necessary party to the determination of that issue. The court sustained the demurrer. The trial then proceeded, and the defendant objected to the introduction of any evidence

on the ground that the petition does not state facts sufficient to constitute a cause of action, that is, that one tenant in common cannot, in our State, maintain an action against another for an accounting after a judgment in partition. The court overruled the objection, and defendant duly excepted.

The allegations of the petition with respect to all the material averments, except the accounting proper, were admitted by the parties. The parties agreed upon nearly all the items of the account; those objected to will be referred to hereafter. The defendant, under his general denial, offered testimony to show ¹⁰ that the deed to the plaintiffs was a forgery. The court excluded the evidence, and defendant excepted. At the close of the trial at the May term, 1895, the court entered a decree requiring the parties to state an account of all the rents and money received by them respectively, prior to January 28, 1895, and also of all taxes, repairs, and other disbursements paid out prior to said date, arising out of the portion of the property in the possession of each, and directed that in the accounting interest at six per cent per annum should be charged on the net amount of rents received monthly by the respective parties, after deducting expenditures, the court finding that the property had been rented by the month. The court then took the case as submitted upon the evidence and proofs submitted, and continued the cause until the next term of the court. Within proper time defendant filed a motion for a new trial.

At the September term, 1895, the court entered a decree finding that the plaintiff had received from the property held by them, \$8,260.67, after deducting expenditures, and that they should be charged with \$1,134.13 interest, aggregating \$9,394.80; and that the defendant had received from the property held by him \$45,918.85, after deducting expenditures, and that he should be charged with \$10,152.66 interest, aggregating \$56,071.51, and adding the aggregate amounts each party had received the court found the total to be \$65,466.31, divided it into two parts, of \$32,733.15 each, deducted the \$9,394.80 plaintiffs had received from the \$32,733.15 allotted to them, and gave them judgment for the balance of \$23,338.38.

The defendant filed a verified motion for new trial, alleging that the decree was entered on the first day of the September term, when defendant's counsel was in attendance upon another division of the court, not ¹¹ anticipating a decision before the first Saturday of the term, and further setting up that since the hearing at the May term he had discovered that he had omitted

to ask credit for \$873.12 taxes paid by him for the year 1889, the oversight having occurred by reason of the fact that he had been allowed credit for one-half of the amount by the probate court on his settlements as administrator of the estate of John L. Hamilton, and accompanied the motion with copies of his settlements as such administrator. The court overruled both motions for new trial, and defendant appealed.

1. The first point relied on by defendant is the refusal of the circuit court to permit him, under the general denial, to introduce evidence that the judgment in partition was obtained by plaintiffs by fraud, in that the deed from John L. Hamilton to these plaintiffs was a forgery.

The suit in equity instituted by the defendant against plaintiffs to have the decree in partition vacated and set aside proceeded upon substantially the same lines followed by the answer in this case. The equity case resulted in a final judgment for the defendants therein, the plaintiffs herein, on demurrer, in the circuit court, the case was appealed to this court and the judgment of the lower court was affirmed: *Hamilton v. McLean*, 139 Mo. 678. In that case Burgess, J., in a very exhaustive and clear opinion, pointed out that in order to set aside a judgment (even in a direct proceeding) alleged to have been obtained by fraud, "it must be made to appear that fraud was practiced in the very act of obtaining the judgment," and that "the fraud must be in the procurement of the judgment, and not merely in the cause of action on which the judgment is founded, and which could have been interposed as a defense, unless its interposition as a defense was prevented by the fraud of the adverse ¹² party." We entirely agree with the reasoning employed and the conclusion reached in that case. There was no error in the action of the trial court in sustaining the demurrer to the second and third defenses set up in the answer in this case, nor in excluding testimony offered under the general denial to prove a state of facts which, when specially pleaded, had been adjudged insufficient. This is more especially true in this collateral proceeding.

2. The second point urged by defendant is that the question of accounting should have been settled in the partition suit, and that as no claim was made against the defendant in that case for rents collected by him, no suit can now be maintained against him on that account.

It is conceded that John L. Hamilton died on August 2, 1889; that this defendant began the partition suit on the 7th

of September, 1889; that none of the parties having an interest in the joint property have been in possession of any part of the joint property using it for their own benefit, but that it has all been rented to tenants, and that the final judgment in the partition case was entered on the 28th of January, 1895. It appears from the evidence and the admissions of the parties that the defendant collected the rents from the whole property from the death of his brother (August 2, 1889) until the decree in partition by the circuit court (March 1, 1891), and thereafter until January 28, 1895, he collected the rents on three-fourths and the plaintiffs on the one-fourth of the property. It is therefore plain that the rents were (with perhaps the exception of the month of August, 1889), collected during the pendency and progress of the partition suit, and the greater part of it after the first decree in partition in the circuit court.

The theory of this defense is, that the accounting ¹³ for rents was an incident to the partition suit and can not be made the basis of a separate action after the termination of that suit.

It is ordinarily true that one tenant in common cannot recover from another rent or compensation for the use by him of the common property. The property in contemplation of law is free to all, and each may enter and enjoy his rights, but where neither occupies the property for his own use and one rents it or any part of it to third persons and collects the rents, or where one, as in this case, denies the right of the other to a part thereof, and thereby pro tanto ousts the other, the rule is otherwise, and an accounting may be had in a suit for partition if there is anything due at the time that suit is begun and such relief is asked at that time, or a suit in equity for an accounting will lie after the termination of the partition suit: In *re Tyler*, 40 Mo. App. 384, and cases cited therein establishing the same doctrine in Alabama, Connecticut, Georgia, Illinois, Kansas, Kentucky, Maine, Massachusetts, New Jersey, and Texas. In *Cook v. Webb*, 21 Minn. 428, one tenant in common ousted the other, and after their respective rights were settled in a suit in partition, the ousted tenant sued for the value of the use and occupation of his undivided half of the premises during the period his cotenant occupied the whole premises, and the action was sustained upon the ground that it was in the nature of the common-law action for mesne profits. This case differs only in form and degree from that.

If the rule was otherwise, there would be a failure of justice, and a tenant in common would be enabled to perpetrate a fraud

upon his cotenant. This case fairly illustrates the results that would follow. Here nearly all the rents were collected pending the litigation, and the largest part after the first decree in partition ¹⁴ and while the case was pending in this court upon appeal. The trial court could, if it had been asked, have only stated the account up to the date of its judgment. It could not have charged defendant for rents to accrue, for it could not have known how much would be collected, pending the appeal. Moreover, if the trial court had stated the account when it rendered its decree, it would have availed these plaintiffs nothing, for their right to any part of the property was denied by that decree, and if an account had been stated by that court at that time, it would have followed the lines of the decree and allowed defendant three-fourths of the rents collected up to that time, and his sister, Mrs. Armstrong, the remaining one-fourth. If this had been done, in view of the decision of this court upon appeal, that action would have been erroneous, because the proportions were wrong, and one-half of the money would have been awarded to the wrong parties. In all partition suits where one of the tenants in common is collecting the rents, or where one party has been ousted by another and the trial court denies the right of the party ousted and he is forced to appeal, there must accrue rents, or the ousting tenant must have the beneficial use of the premises during the appeal. It is manifest that these are matters that can only be settled after the final adjudication of the rights of the parties to the premises. The rights of the cotenants to the accruing rents, issues, and profits do not depend upon an express contract between them. They attach as incidents to their ownership of the res. When one tenant in common collects rents from the common property, he becomes a trustee of the amount collected for the benefit of all the tenants in common, in the proportion of their respective holdings, and a proceeding in equity for an accounting is a proper remedy, if the rights of the ¹⁵ other tenants are denied or if the tenant refuses to do his plain duty.

3. The trial court charged each party interest on the amount collected by each. This is alleged as error. It is an universal rule that where one collects money for another and fails or refuses to account for or pay it when the debt is legally and technically due, interest will be charged against him: *Sutherland on Damages*, 2d ed., sec. 329; *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649; *Barker v. White*, 58 N. Y. 214. And where a trustee mingles trust funds with his own to a large amount and for a

long time, as was done in this case, he is liable for interest although he has made none: *In re Murdoch*, 129 Mo. 499; *Davis v. Coburn*, 128 Mass. 380; *Roberts' Appeal*, 92 Pa. St. 407; *Bobb v. Bobb*, 89 Mo. 411.

The rents in this case were collected monthly. During his brother's lifetime, the defendant settled with him monthly. After his death and until 1891, he collected the whole rent, and from 1891 to 1895 he collected three-fourths of it. As early as September, 1889, the agent of the plaintiffs demanded the rents then due, and that thereafter he settle with them monthly as he had done with his brother. He refused to turn over any part of the rents collected or to recognize their right at all. Under these circumstances, there was no error committed by the circuit court in charging interest on monthly balances.

4. During the pendency of the appeal from the first decree, and while the plaintiffs were in charge of the one-fourth of the premises allotted to their mother, they paid \$900 to satisfy two special tax bills for street paving, issued against the part of the property in their charge. It seems to be conceded by the parties that there was a suit pending against other property, represented by defendant, to enforce similar tax bills ¹⁶ against it, and that after plaintiffs paid these two tax bills, the defendant succeeded in having the other tax bills declared invalid. This case was brought here on a certificate of the judgment. The defendant's abstract does not contain all the evidence. There is nothing before us from which we can ascertain whether the tax bills were valid or not. Plaintiffs rely upon the fact that the tax bills were paid in good faith and upon the advice of competent and able attorneys, and insist that they are entitled to credit for the amount paid, notwithstanding the success of the defendant in defeating other tax bills which seem to be admitted grew out of the same contract for public improvements.

In *Miller v. Proctor*, 20 Ohio St. 442, it was held that where trustees exercise proper diligence and precaution and act upon the advice of counsel, they are not liable for losses occurring from matters as to which it is doubtful what the true law is. In *Taylor v. Hite*, 61 Mo. 144, Napton, J., in speaking of the duty of a trustee, said: "He is bound to employ such diligence and such prudence in the care and management of a trust fund as, in general, prudent men of discretion and intelligence in such matters employ in their own affairs." A trustee is not liable for all losses to the trust fund. If he acts in good faith, and exercises such care as a man of ordinary prudence would exercise in

the management of his own affairs, he is not liable for losses arising out of the management of the trust fund in a legal manner. In this case we are not informed as to the character of the infirmity in the tax bills—in fact, no light whatever is given us by which to determine whether the plaintiff ought to have resisted, even to the extent of a suit, the payment of these bills. We must therefore, on this showing, give them credit for having acted prudently, carefully, and with proper regard for the preservation of the trust ¹⁷ property in paying off the liens against it: *Scudder v. Ames*, 142 Mo. 187.

5. At the May term, 1895, the court entered a decree for an accounting, prescribing the rules therefor, the parties submitted statements of account, and the court took the matter under advisement, and continued the case. On the first day of the next term the court entered a final decree. At that time defendant's counsel was engaged in another court, not expecting the court would act until the next Saturday. Counsel at once filed a verified motion for a new trial setting forth these proceedings and alleging that since the submission of the cause defendant had discovered an omission in his account as shown the court at the May term, in this, that as administrator of the estate of his brother he had taken credit for \$436.56, being one-half of the \$873.12 which he had paid as taxes against the property for the year 1889, and asked the court to set aside the final judgment and give him credit for \$873.12. The court refused the application. The copies of the two settlements as administrator of his brother's estate, attached to defendant's motion, both show that he was allowed credit against that estate for \$436.56, being one-half of the State and county tax on the joint property for the year 1889. It is not easy to understand on what principle defendant now asks to be allowed credit a second time in this action for the same item for which he has already been given credit as administrator. He paid it but once, and has been fully reimbursed by the credit allowed him by the probate court. If the creditors and devisees or heirs make no objection to the amount being brought into the administration of the estate and being paid out of the funds that came from other sources than the joint property, it does not lie in the ¹⁸ mouth of defendant to object, and most certainly affords no reason for allowing him credit a second time in this action. Under paragraph 3, of section 183, article 9, chapter 1, of the Revised Statutes of Missouri of 1889, it was the duty of the defendant to pay off the taxes against the joint property for the year 1889, and it was proper

for the probate court to allow him credit for one-half of the amount paid—he, owning the other half of the property, was liable for the other half of the taxes. The action of the trial court was clearly right in this regard.

We are unable to see how the defendant was prejudiced by the action of the court in entering judgment on the first day of the September term in the absence of his counsel, instead of waiting until the following Saturday. The case had been fully tried at the May term, and a decree for an accounting had been entered, and the proofs of each party had been submitted to the court. There was nothing left for the court to do but to pass upon the objections of the parties to certain items of the account submitted by each, and to calculate the interest to be charged, and for this purpose the court, by consent of the parties, took the case under advisement and continued it until the September term. The whole case was then in the breast of the court. The defendant could introduce no further testimony unless the submission was set aside by the court and the case again opened for further testimony. No such application was made before the decree was entered. But inasmuch as it was made after the decree was entered, and inasmuch as we are of the opinion that he was not entitled to the further credit he asked, his rights have not been impaired in any manner.

The judgment of the circuit court is for the right party, and finding no error in its proceedings, we affirm its judgment.

All the judges of this division concur.

JUDGMENTS—RELIEF FOR FRAUD.—The acts for which a court of equity may, on account of fraud, set aside or annul a judgment between the same parties have relation only to fraud extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment was rendered: *Camp v. Ward*, 69 Vt. 286; 60 Am. St. Rep. 929, and note; monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 233-240.

COTENANCY—LIABILITY FOR RENTS AND PROFITS—ACCOUNTING.—Where a cotenant has received from a third person the rents and profits of the common property, there is no doubt of his liability to account to his cotenants if he has received more than his share thereof. If he commits any act which they may deem an ouster, he becomes answerable to them for the value of the use and occupation of their share of the property. In such a case, it is not material whether he makes profits or not. In excluding the others from possession, he has denied them a right, and must compensate them for any damages sustained by them, whether his wrong has been profitable to himself or not: See monographic note to *Ward v. Ward*, 52 Am. St. Rep. 925, 928.

COTENANCY—TRUST RELATION BETWEEN COTENANTS—LIABILITY FOR INTEREST.—One tenant in common receiving rents under an implied trust for another is chargeable with inter-

est on the amount found in his hands from the time of its receipt: *Tarleton v. Goldthwaite*, 23 Ala. 346; 58 Am. Dec. 296; *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649, and monographic note; *Huff v. McDonald*, 22 Ga. 131; 68 Am. Dec. 487.

COTENANCY—LIABILITY FOR RENTS AND PROFITS—ELEMENT OF GOOD FAITH.—Where one cotenant holds the common property to the exclusion of another, he is not chargeable with rents or profits where none have been made, provided he has employed the property in good faith with a view to make it profitable, but has failed in doing so: *Ruffners v. Lewis*, 7 Leigh, 720; 30 Am. Dec. 513. See monographic note to *Waru v. Ward*, 52 Am. St. Rep. 924-941.

COTENANCY—PAYMENT OF TAXES BY ONE COTENANT.—A tenant in common who pays the taxes against the whole of the common property is entitled to contribution from his cotenants to the amount of the taxes due from each on his interest: *Cocks v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28, and note; *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949, and note.

MISSOURI, KANSAS AND EASTERN RAILWAY COMPANY v. HOLSCHLAG.

[144 MISSOURI, 253.]

JUDGMENTS—ENTRY NUNC PRO TUNC.—Entry of a judgment, nunc pro tunc, can be made only upon evidence furnished by the papers and files in the cause or something of record, or in the minute-book or judge's docket as a basis to amend by.

JUDGMENTS—PRESUMPTIONS.—The judgment appearing upon the record is presumptively the judgment of the court, and not an error of the clerk, and it is also presumed that the record correctly states the date of the judgment.

JUDGMENTS—ENTRY NUNC PRO TUNC.—Written opinions by judges of trial courts are not required nor provided for by law. Such an opinion is not a paper in the case constituting a part of the record, and an entry thereon by the clerk of the date it was filed with him is not evidence of the date that the judgment was rendered, upon which an entry nunc pro tunc can be based.

G. P. B. Jackson and G. P. Smith, for the appellant.

E. Rosenberger, and J. D. Barnett, for the respondent.

255 WILLIAMS, J. The circuit court overruled appellant's application for a nunc pro tunc entry of the judgment in this case. The record shows that said judgment was rendered on the 19th of December, 1893, but appellant claims that it was in fact rendered on the 21st of said month. This ruling presents the first question for decision.

Plaintiff below, the appellant here, claimed to have acquired a right of way for its railroad across defendants' farms, and alleged that they, with weapons and violent means, were forcibly

resisting the construction of said railroad over said lands, and asked an injunction to prevent interference with the work. A temporary restraining order was issued on the 11th of October, 1892. Defendants appeared to the suit and filed answers. The case was heard on the 17th of November, 1893, and taken under advisement. There was no record entry of this, however. The records of the court show that judgment was rendered for defendants and plaintiff's bill dismissed on the 19th of December, 1893. Plaintiff, at the May term, 1897, filed a motion for a nunc pro tunc entry as above stated. The date of the judgment becomes material, because if it was rendered on the 19th the motion for a new trial was clearly filed out of time.

It was shown upon the hearing of the application for the nunc pro tunc entry, that the clerk did not write ²⁵⁶ the judgment until a month or more after it was rendered; that he began to enter it in a blank space in the record of the proceedings of the court of December 2d, and afterward put it upon the 19th. It further appeared that it was written in different ink, and apparently at a different time from the opening order on the 19th. There was nothing in the clerk's minutes to show when the judgment was rendered. The entry upon the judge's docket in the handwriting of the judge was as follows: "Trial by court—Bill dismd.," and then in pencil written by the clerk, "Dec. 2nd." The judge wrote an opinion stating his conclusions in the case, which ended with these words: "This bill is dismissed." This paper is marked by the clerk, "Filed Dec. 21st, 1893." The testimony for respondent was that this opinion was not filed at the time the judgment was rendered; that the judge announced the decision, and stated that he had written his views of the matters involved, but had omitted to bring the paper to the courtroom with him. The bill of exceptions, filed April 30, 1895, recites that the trial was had on the 17th of November, 1893, and "thereupon an order of the court dismissing the bill was on the 19th of December, 1893, duly entered." Other evidence was introduced by the parties concerning the manner in which the records were written, and of circumstances tending to support their respective contentions as to when the judgment should bear date.

It is not disputed, nor can it be, that the settled law of this state is that entries nunc pro tunc can only be made upon evidence furnished by the "papers and files in the cause or something of record, or in the minute-book or judge's docket" "as a basis to amend by": *Gamble v. Daugherty*, 71 Mo. 599. "The

judgment appearing upon the record is presumptively ²⁵⁷ the judgment of the court and not an error of the clerk": *Belkin v. Rhodes*, 76 Mo. 643. The presumption, then, is that the record correctly states the date of the judgment. The entry thereof in the proceedings of the court is supported by the recital in the bill of exceptions as to the time of its rendition.

The only memorandum of any kind upon any record or paper in the case, relied upon as indicating anything to the contrary, is the notation of the clerk upon the written opinion of the trial judge, showing that it was filed with said clerk December 21, 1893. The judge was not required to prepare or file any such paper. It was not prepared at request of the parties under Revised Statutes of 1889, section 2135. The law makes no provision for an opinion in writing by the judge of the trial court: *Hewitt v. Steele*, 118 Mo. 463. It was entirely optional with him whether he would write out his conclusions, and, after he had reduced them to writing, whether he would file the paper, and when. If he elected to write an opinion, it was not necessary that it should be delivered to the clerk at the time of the rendition of the judgment, but could be handed to him at the pleasure of the judge. In other words, it was not a paper in the case provided for by law, but a mere statement of the reasons for his decision, written by the judge for the convenience and satisfaction of the parties, and its delivery to the clerk was not necessarily contemporaneous with the judgment. The testimony introduced by the respondent shows that it was not in fact filed at the time the decision of the court was announced. We do not think the circuit court committed error in deciding that the memorandum upon this paper was insufficient to overthrow the judgment entry.

2. The motion for a new trial was not filed until December 27th. The motion, therefore, was out of time, ²⁵⁸ and we cannot consider anything except errors upon the face of the record proper. It is not claimed that there are any such errors. It results that both the order of the trial court refusing to make the nunc pro tunc entry (from which an appeal was taken), and also the judgment of December 19, 1893, dismissing plaintiff's bill, must be affirmed.

It is so ordered.

All concur.

JUDGMENTS—ENTRY NUNC PRO TUNC—EVIDENCE.—The principal case, in passing upon a question as to which the au-

thorities are in conflict, adheres to the doctrine already established in Missouri, that the entry of a judgment *nunc pro tunc* can only be made upon showing some entry or memorandum on, or among, the records, or quasi records, of the court, and that parol evidence of the judgment and of its terms cannot be received: See monographic note to *Ninde v. Clark*, 4 Am. St. Rep. 831, 832, where the matter is fully discussed. In Texas, it is held that proof, to authorize the entry of a judgment or sentence, *nunc pro tunc*, may as well be made by parol as by record evidence: *Gonzales v. State*, 35 Tex. Cr. Rep. 339; 60 Am. St. Rep. 51; and in Ohio it is held that, in determining whether certain judicial action has been taken, the court may resort to all sources of information that are competent under general rules of evidence, including the oral testimony of witnesses: *Jacks v. Adamson*, 56 Ohio St. 397; 60 Am. St. Rep. 749, and note.

STATE v. ZIEGENHEIN.

[144 MISSOURI, 283.]

CONSTITUTIONAL LAW—POLICE PENSIONS.—A statute providing that any person who shall serve as a policeman for twenty years or more may be retired from active service, on half-pay, for the remainder of his life, is void as violating a constitutional provision declaring that the legislature shall have no power to authorize a grant of public money in aid of or to any individual. Nor can such statute be upheld on the ground that such pension is part of the contract of employment of such policeman, and that the payment to him of half his former salary after retirement is in compensation for services rendered theretofore.

STATUTES—CONSTRUCTION—PROSPECTIVE ACTION. A statute providing that any person who shall serve as a policeman for twenty years or more may be retired from active service on half-pay for the remainder of his life is prospective in its application; and no policeman is within its provisions, unless he shall have been in active service as such for twenty years after such statute went into effect.

Hough & Hough, and C. T. Noland, for the relator.

C. C. Allen, for the respondent.

²⁸⁶ WILLIAMS, J. We are called upon in this case (which is an original proceeding in this court by mandamus ²⁸⁷ against the St. Louis Police Board) to determine the validity of what is known as the "police pension law" of 1895. A statute enacted in 1861 created a board of commissioners for the control of the police force of the city of St. Louis, and committed to said board the entire charge and management thereof. The commissioners, except the mayor of said city, who is *ex officio* a member and president of the board, are appointed by the governor, and the policemen are declared by the statute to be officers of the state: 2 Rev. Stats. 1889, sec. 33, p. 2200. The salaries are paid by the city, and the board is authorized to certify to the correctness

of claims against the police department. Relator, a former member of the force, asserts that he is entitled to half-pay since June 16, 1897, when he was placed upon the "retired list," and asks that the board of police commissioners be required to issue a proper certificate to him showing that fact. He bases his rights upon, and the question for decision arises out of, the amendatory act of April 9, 1895, to be found in the session acts of 1895, page 234. The parts material to this controversy are as follows:

"The board of police commissioners are hereby authorized to make all such rules and regulations, not inconsistent with this act, as they may judge necessary for the appointment, employment, uniforming, disciplining, trial, and government of the police and for the relief and compensation of members of the police force injured in person or property in the discharge of their duty, and the families of the officers and men killed while in such discharge of duty. And whenever any person is employed by said board as a policeman, such employment shall be upon the following conditions: 1. [A provision is here inserted for the retirement upon half-pay of one physically disabled ²⁸⁸ while in the performance of his duty as policeman.] 2. If a member of the force shall lose his life while in and by reason of the performance of his duty and shall leave a widow, or children under sixteen years of age, such widow during her life, and if there be no widow then the child or children until they become sixteen years old, shall receive a monthly payment equal to one-half of the salary attached to the rank which the policeman held at the time of his death. 3. Any person so employed, who shall serve for the period of twenty years or more, may, in the discretion of said board, be retired from active service and be thereafter paid during his natural life a yearly salary equal to one-half the amount of the salary attached to the rank which he may have held on said force for one year next preceding his retirement." It is further declared that no one retired under the provisions of said act shall be entitled to any relief from the police relief association organized under section 2885 of the statutes of 1889.

Relator was appointed a member of the police force on March 23, 1866. He entered upon the discharge of his duties April 1, 1866. The board adopted a rule, on March 11, 1884, that all officers be commissioned for a term of four years from April 1, 1884, and he received a commission for that length of time. He, at his own request, was made a turnkey on the 31st of

May, 1886, and continued to serve in that capacity until June 16, 1897, when the board placed him upon the "retired list." He was not reappointed at the expiration of each period of four years during his service, but continued in his position without any action by the board upon the subject. He claims that this amounted to a new appointment at the end of every four years for another term of the same length, and thereby made his last appointment date from April ²⁸⁹ 1, 1896, after the act of 1895, *supra*, went into effect. As a matter of fact, however, no action was taken by the board at that time, and he simply continued in his position without any new appointment or commission. The salary of a turnkey is sixty-five dollars a month and relator claims to be entitled since June 16, 1897, when he was retired from active service, to a monthly salary of thirty-two dollars and fifty cents, and that he will be entitled to a like amount each month during his life under the act aforesaid.

One ground relied upon in defense of the claim is that the constitution of the state expressly forbids such allowances. Section 47, article IV, is cited in support of this contention. It declares that "the general assembly shall have no power to authorize any county, city, town, or township or other political subdivision of the state now existing, or that may hereafter be established to grant public money in aid of or to any individual, association, or corporation whatsoever." It is conceded that the legislature cannot, under the constitution of this state, authorize a city to give money out of its treasury simply as a gratuity in recognition of past services rendered by public officers. It is claimed, however, that the provisions of the act of April 9, 1895, for the retirement upon half-pay of police officers after twenty years of service, *et cetera*, is part of the contract of employment of those appointed since that act took effect, and constitutes a portion of the compensation for the services rendered before retirement; that the act provides, in advance, that the pay of the men upon the force shall consist of the salaries to be drawn during the time they shall hold their places, and half of the same after they are put upon the retired list.

If the argument in support of relator's position could be successfully maintained, it would avail him ²⁹⁰ nothing. He was in office less than two years after the time fixed for the act to go into operation. Eighteen of the twenty years of his service were before there was any provision for such alleged compensation, payable after retirement. If this is to be regarded as an

additional salary for twenty years of faithful and efficient work in the police department, the relator would certainly be receiving, in part, at least, a gratuity for what he had done before the act went into effect, and before any such compensation, as is now claimed, was provided.

Then, too, the law must be given a prospective operation, and its language indicates that such was the intent of the law-makers. The words used are: "Any person so employed who shall serve for the period of twenty years or more may be retired from active service." This would seem to refer to services to be thereafter performed, and applying the ordinary rules in the construction of statutes, this language would imply that the twenty years of service must be in the future and necessarily after the passage of the act. The rule is, that legislative enactments are held "to operate prospectively and not otherwise, unless the intent that they are to operate in such an unusual way, to wit, retrospectively, is manifest upon the face of the statute in a manner altogether free from ambiguity": *Leete v. State Bank*, 115 Mo. 184-195, and cases cited.

The act, however, is in all essential features simply a "pension law," and is properly so called. It can not be treated merely as providing compensation for services rendered before retirement and as part of the salary therefor. A salary, payable from time to time during active service, is received by each police officer, and the amount is fixed according to rank. The man who serves twenty years is entitled to no less during that period than he whose tenure is shorter. The policeman, ²⁹¹ who remains on the force for twenty years less five days, and the one who retains his office for the full term, are paid during active service precisely the same sum, if they are of like rank. This must be deemed proper compensation for the time actually devoted to the public service. Nothing is withheld from the person who may serve twenty years, to be paid to him after he may be placed upon the "retired list," and after such retirement he is no longer subject to police duty and can not be earning a salary: Acts 1895, p. 235, par. 3.

If he has been paid the same as other officers of shorter terms, for the time devoted to public duties, anything in addition thereto can only be regarded as a mere gratuity. The argument of the relator would establish the proposition that it is a mere matter of legislative discretion to give a salary after retirement to all officers of the state and its municipalities, provided they

shall be elected or appointed after the passage of an act to that effect.

In *Mead v. Acton*, 139 Mass. 341, the supreme judicial court of Massachusetts, in discussing a somewhat similar subject, said of the act then being considered, as we feel constrained to say of the one now under discussion: "In any view we can take of the statute, the payments it contemplates are mere gratuities or gifts to individuals. The principle would be the same if a town should vote a gratuity or pension to one who had rendered service as an officer, or was in any way entitled to its gratitude. This a town has not the power to do, even with the sanction of the legislature."

The courts should not search for plausible reasons and specious pretexts to evade and set aside constitutional prohibitions against the improper use of public funds, and thereby unnecessarily increase the burdens of taxation. Upon the contrary, all such provisions ²³² in the organic law of the state should be enforced and made effectual according to their plain meaning and intent.

We are not unmindful of the important services rendered by the offices of the police force and of the benefits derived from their faithfulness in protecting and guarding the lives and property of the citizens. They are officers of the state, however, and the constitution has declared that, like all others holding official stations, they must rest content with the remuneration fixed by law, and after their services have been performed, no matter how valuable they may have been, the city cannot, as a gratuity or pension, "grant public money to or in aid of any individual," and the courts have no power to require it to be done. A peremptory writ must be denied.

Gantt, C. J., and Sherwood, Burgess, Robinson, and Brace, JJ., concur.

Marshall, J., having been of counsel, took no part in the decision.

CONSTITUTIONS—POWERS OF LEGISLATURE—GIFTS TO PUBLIC SERVANTS.—The legislature of California has no power, under the state constitution, to make gifts to its employes, or to allow them extra compensation after service rendered: *Robinson v. Dunn*, 77 Cal. 473; 11 Am. St. Rep. 297.

MUNICIPAL CORPORATIONS—POLICE PENSIONS.—A reasonable appropriation by a city to a corporation organized to create a fund to pension its members who are policemen, is an appropriation to a strictly municipal use, and necessary for the welfare and comfort of the city, and not in violation of a constitutional pro-

vision prohibiting the legislature from authorizing any city "to become a stockholder in any company, association or corporation, or to obtain or appropriate money or to loan its credit to any corporation, association, institution, or individual": Commonwealth v. Walton, 182 Pa. St. 373; 61 Am. St. Rep. 712.

STATUTES—CONSTRUCTION.—Words of a statute ought not to be given a retrospective operation, unless they are so clear and strong and impressive that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied: Lawrence v. Louisville, 96 Ky. 595; 49 Am. St. Rep. 809, and note.

CALUMET PAPER COMPANY v. HASKELL SHOW PRINTING COMPANY.

[144 MISSOURI, 381.]

CORPORATIONS—INSOLVENCY.—AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS by an insolvent corporation must be made by resolution of the board of directors. Such resolution cannot be passed when a minority only of such board is present.

CORPORATIONS—ASSIGNMENTS.—As a general rule, a corporate assignment must be executed by the board of directors, or a quorum thereof, at a meeting duly called for that purpose, or by the president or some other officer of the corporation, as authorized by the directors.

CORPORATION—VOID ASSIGNMENT.—An assignment by a corporation executed by two of its five directors is void for want of authority.

CORPORATIONS—VOID ASSIGNMENT—HOW MAY BE ATTACKED.—A void assignment by an insolvent corporation may be attacked in a suit in attachment by the creditors of the corporation.

CORPORATIONS — ASSIGNMENT — ATTACK. — An assignment by an insolvent corporation is not a judicial proceeding, and anyone asserting rights under it, as against a stranger, has the burden of proof to show at least an assignment valid on its face. The other party may show that it is invalid by reason of extrinsic facts, or that it was unauthorized by a legal meeting of the directors. The validity of such an assignment may be attacked by a creditor of the corporation, by suit in attachment, or other collateral proceeding.

CORPORATIONS—ASSIGNMENT—RATIFICATION.—A corporate assignment, unauthorized by the board of directors, can be ratified only by such board as a body, and not by its members severally.

CORPORATIONS — ASSIGNMENT — RATIFICATION AFTER ATTACHMENT.—A ratification of a void corporate assignment by the board of directors, after a corporate creditor has commenced suit in attachment, and summoned the assignee as garnishee, does not affect the rights of the attaching creditor.

CORPORATIONS—ASSIGNMENT—EFFECT OF GARNISHMENT WITHOUT ATTACHMENT.—Service of garnishment on the assignee of a corporation without the levy of an attachment on its property, does not transfer such property to the officer nor give him any right to control it, and the attachment creditor acquires no lien,

CORPORATIONS — UNAUTHORIZED ASSIGNMENT — ASSIGNEE AS BAILEE—RIGHTS OF ATTACHING CREDITOR.—

An unauthorized assignment by an insolvent corporation, transfers all of its property to the assignee as bailee, in trust, for the benefit of its creditors, and he thereafter holds as bailee and not as assignee; and an attaching creditor, without levy of attachment, acquires no priority of right to the property over other creditors.

CORPORATIONS — INSOLVENCY — GARNISHMENT.—Property of an insolvent corporation held in trust for the benefit of all its creditors and stockholders is not subject to garnishment by one of them.

Harwood & Meredith, and S. S. Parks, for the appellant.

Haff & Van Valkenburgh, and H. Wollman, for the respondent.

334 BURGESS, J. On July 5, 1893, and for some time prior thereto, the Haskell Show Printing Company was a corporation organized under the laws of the state of Missouri, and doing business in Kansas City, Missouri. The board of directors of the corporation consisted of five members, viz., W. H. Haskell, W. L. Haskell, G. C. Wattles, J. P. O'Connell, and H. P. Schell, all of whom were stockholders. The corporation being insolvent, and unable longer to continue business, W. L. Haskell and G. C. Wattles on said fifth day of July, **335** 1893, met and decided to make an assignment of the corporate assets for the benefit of all creditors of the corporation, and then and there executed to the garnishee, Charles D. Parker, a deed of general assignment for that purpose. None of the other directors were present at that time, nor had either of them notice of the meeting. The plaintiff, being a creditor of the Haskell Show Printing Company, commenced suit by attachment against the defendant company on August 9, 1893, and served the assignee, Charles D. Parker, with a garnishment summons on the same day, claiming that the assignment was void, and that the property in possession of the assignee under the deed of assignment was liable to attachment for the debt of the Haskell Show Printing Company. The attachment was sustained. There was some evidence tending to show a ratification of the assignment by the stockholders.

The court below sustained the validity of the assignment, and rendered judgment in favor of the assignee for costs, from which judgment plaintiff appeals.

The case was tried, and is presented here as if the manner in which the assignment was executed and its subsequent ratification by the stockholders of defendant company were the principal questions involved.

At the close of the evidence, plaintiff asked the court sitting

as a jury to declare the law to be that an assignment of the property of the corporation for the benefit of its creditors could only be made by the directions of the board of directors, which the court refused to do, and in so refusing plaintiff insists that error was committed.

Where there is nothing in the charter or by-laws of an insolvent corporation prohibiting it, the board of directors of such a corporation may make an assignment ³³⁶ of its property for the benefit of its creditors (Chew v. Ellingwood, 86 Mo. 260; 56 Am. Rep. 429; Descombes v. Wood, 91 Mo. 196); 60 Am. Rep. 239, but it must be done by resolution of the board. Chancellor Kent says: "There is a distinction taken between a corporate act to be done a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former a majority of the definite body must be present, and then a majority of the quorum may decide": 2 Kent's Commentaries, 14th ed., *293; Foster v. Mullanphy Planing Mill Co., 92 Mo. 79. In such circumstances, the corporation may not only make such an assignment against the wishes of the stockholders, but if they object it is its duty to do so anyway: Descombes v. Wood, 91 Mo. 196; 60 Am. Rep. 239; Hutchinson v. Green, 91 Mo. 367; Huse v. Ames, 104 Mo. 91. In so far as the case of Eppright v. Nickerson, 78 Mo. 482, holds that an assignment made under the circumstances disclosed by this record is void as to the stockholders, and that such an assignment cannot be attacked upon the ground of fraud by creditors of the corporation, it is overruled. As to the last proposition see Louisville Banking Co. v. Etheridge Mfg. Co. (Ky. Oct. 1897), 43 S. W. Rep. 169.

"Unless otherwise provided by statute, the general rule is, that a corporate assignment must be executed by the board of directors, or a quorum thereof, at a meeting duly called for that purpose, or by the president or some other officer of the corporation, as authorized by the directors": 3 Am. & Eng. Ency. of Law, 2nd ed., 24; 3 Thompson on Corporations, sec. 3905.

"Where a creditor elects to disregard the assignment and attaches the property of the corporation, and thereupon a contest arises between him and the assignee, the question is one which concerns the title of the assignee to the property, and it is properly drawn in question in such ³³⁷ a proceeding; it is not a question where, in theory of law, the validity of the assignment is subject to collateral attack. But if it were, the rule

would be the same; since such an assignment is not a judicial proceeding, and in every case where any person asserts rights under it as against a stranger, the burden is upon him to show at least an assignment valid on its face; and the other party may show that it was invalid by reason of extrinsic facts, as that it was unauthorized by a legal meeting of the directors": 5 Thompson on Corporations, sec. 6478. "When such an assignment has not been validated by acquiescence or laches, it may obviously be impeached, either by creditors or stockholders, on the ground that it was not made by the directors at a meeting duly convened, that is to say, on the ground that it was not made by the board of directors at all, for the acts of the directors are of no validity unless they are regularly assembled and acting as a board, and unless the proper quorum has concurred in the action which is challenged": 5 Thompson on Corporations, sec. 6479; *Doernbecher v. Columbia City Lumber Co.*, 21 Or. 573; 28 Am. St. Rep. 766.

It is not claimed that the president of the corporation had notice of the meeting held by the two directors at the time the assignment was made, nor was he represented by attorney, nor does the evidence show that the other two directors, O'Connell and Schell, had notice of the meeting, or that they were present on that occasion. It is no excuse to say that the two last named were mere nominal stockholders; they in part composed the board of directors, either one of whom, together with those that were present, would have constituted a majority of the board. Our conclusion is, that the assignment was void for want of authority in the two directors to make it, and that the court erred in refusing to so declare the law.

³³⁸ It is contended by the garnishee that even if it should be held that the assignment was not authorized by the board of directors, that it must be held under the evidence to have been ratified before the attachment suit was begun. This contention is based upon the ground that the plaintiff did not sue out its attachment for nearly one month after the assignment was made, during which time it is claimed that the stockholders and directors of the defendant company were formally informed by the company's officers of the fact that the assignment had been made by Wattles, acting as president and manager, and W. E. Haskell, secretary, and that the other directors, as well as the stockholders of the corporation, not only did not take any action looking to a disaffirmance of the assignment, but, on the contrary, approved it fully, and acquiesced in everything

that had been done by Wattles and W. L. Haskell. Judge Thompson in his Commentaries on the Law of Corporations, volume 4, section 5287, says: "It is a general principle, in respect of the doctrine of ratification, that a ratification can take place only when the person or body assuming to affirm the act had the power either to do it, or to authorize the doing of it, in the first instance": *Price v. Grand Rapids etc. R. R. Co.* 13 Ind. 58. The members of the board severally could not ratify the assignment, because they could not in the first place have made it in their individual capacity, but only as a board and not otherwise could they ratify it so as to effect this plaintiff.

It may be in a direct proceeding against the stockholders they might, by reason of their silence and acquiescence in the assignment, be held to have ratified the same: *Washington Sav. Bank v. Butchers etc. Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, but no such rule can be invoked against the plaintiff under the circumstances disclosed by the record in this case. As the attempted assignment was made when only two of the directors ~~330~~ were present, it was clearly void, and nothing passed by it to the garnishee, and no ratification by the board, even if such a thing was done after service of the garnishment, could have in any way affected the rights of the attaching creditor: *Norton v. Alabama Nat. Bank*, 102 Ala. 420.

An assignment for the benefit of creditors by an insolvent corporation must be by resolution of the board, and it cannot be done by a resolution passed when a minority only of the board of directors are present: Rev. Stats. 1889, sec. 2510; *Price v. Grand Rapids etc. R. R. Co.*, 13 Ind. 58. Our attention has not been called to an authority to the contrary, nor do we think any exists, unless it be in case such authority is conferred by the charter or by the by-laws of the corporation, and no such authority was conferred by the charter or by-laws of the Haskell Show Printing Company. As nothing passed to the assignee by virtue of the assignment, and the property was not seized under writ of attachment, and the garnishee admitted in his answer that certain property of the corporation had been received by him, and he did not discharge himself under sections 5224 and 5225 of the Revised Statutes of 1889, it never became custodia legis, but remained in the custody of the garnishee: *McGarry v. Lewis Coal Co.*, 93 Mo. 237; 3 Am. St. Rep. 522; *Bank v. Bredow*, 31 Mo. 523; *Bigelow v. Andress*, 31 Ill. 333; *Norvell v. Porter*, 62 Mo. 309.

At the time of the assignment, however, the Haskell Printing

Company was hopelessly insolvent, had ceased to be a going concern, and all the property which the company then owned it turned over to the defendant Parker, for the benefit of its creditors and stockholders, the effect of which was to transfer it to him as bailee in trust for their benefit. Parker then holds the property as bailee of the corporation for the benefit of its creditors and stockholders, and not as assignee. The question then is, what lien or prior right, if any, plaintiff acquired ³⁴⁰ by reason of the garnishment, the property not being attached, over all other creditors of the company. It was ruled in *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 3 Am. St. Rep. 522, that no lien is created in favor of plaintiff on the property of the defendant in the hands of the garnishee by reason of the garnishment process. The court said: "Ordinarily, property is not deemed to be in the custody of the law until actually seized and reduced into possession by the officer. Under the law applicable to attachments, it is the levy by the officer that creates the lien. If the plaintiff is not satisfied to look to the responsibility of the garnishee, he may apply to the court, or to the judge in vacation, and obtain an order upon the garnishee to deliver the property to the sheriff or into court, or the court may permit the garnishee to retain the property upon the execution of a bond to plaintiff with security: Rev. Stats. 1879, sec. 2524; *Bank v. Bredow*, 31 Mo. 523." These provisions seem to have been regarded as affording ample protection: See, also, 2 *Wade on Attachments*, sec. 325; *Drake on Attachments*, 4th ed., sec. 453. In *Bigelow v. Andress*, 31 Ill. 322, it is said: "By the service of the garnishee process there can be no pretense that the property is, in any sense, transferred to the officer, or that he thereby acquires any right to control it. The garnishee still has the right to retain it, and by the service only becomes liable to account for it, or its proceeds, if judgment shall be rendered against him on the trial. The statute does not prohibit him from disposing of it, but only renders him liable on failing to produce it to satisfy the judgment": *Walcott v. Keith*, 22 N. H. 196. Moreover, the property being a trust fund for the benefit of all the creditors and stockholders of the company, it was not subject to garnishment (1 *Elliott's General Practice*, sec. 386), and no one creditor could by reason of the garnishment process gain ³⁴¹ an advantage over the other creditors: *Haust v. Burgess*, 4 *Hughes*, 560.

The court having acquired jurisdiction of the trustee by reason of the garnishment process, we reverse the judgment and

remand the cause, in order that the creditors of the printing company may interplead if so inclined, and that the funds in the hands of the garnishee, or which may come into his hands as bailee for said company, may be distributed pro rata among them.

Gantt, P. J., and Sherwood, J., concur.

CORPORATIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS — VALIDITY — COLLATERAL ATTACK.—A corporation may make an assignment for the benefit of creditors: Albany etc. Co. v. Southern Agricultural Works, 76 Ga. 135; 2 Am. St. Rep. 26; monographic note to Buck v. Ross, 57 Am. St. Rep. 76. Directors of a manufacturing corporation have authority, by their vote, to authorize its treasurer to make a conveyance of all its property provisionally, upon condition to pay or provide for the payment of the just debts of the corporation: Sargent v. Webster, 13 Met. 497; 46 Am. Dec. 743. If an assignment is complete and regular on its face it cannot be attacked in a collateral proceeding: Hamilton Brown Shoe Co. v. Mercer, 84 Iowa, 537; 35 Am. St. Rep. 331, and note. See monographic note to Bank of Little Rock v. Frank, 58 Am. St. Rep. 74-101.

GARNISHMENT—ASSIGNEE FOR BENEFIT OF CREDITORS NOT SUBJECT TO.—No creditor can, by attachment or garnishment, take any part of an estate held by an assignee for the benefit of creditors under a valid assignment out of his hands, and apply it to the payment of his debt: Moody v. Carroll, 71 Tex. 143; 10 Am. St. Rep. 734. See Barrett v. Pollak Co., 108 Ala. 390; 54 Am. St. Rep. 172.

HICKS v. HAMILTON

[144 MISSOURI, 495.]

MORTGAGES—ASSUMPTION OF MORTGAGE DEBT.—A mortgagee cannot recover upon an agreement to assume the mortgage debt inserted in a deed to a remote grantee of the premises, when the grantor in such deed purchased the premises subject to the mortgage, but did not agree to pay, and was not liable for, such debt.

CONTRACTS—CONSIDERATION TO SUPPORT ACTION.—A mere naked promise, without consideration, from one to another, for the benefit of a third person, cannot sustain an action.

MORTGAGES—ASSUMPTION OF MORTGAGE DEBT.—Unless the grantor is personally liable for a mortgage debt on the premises granted, the mere promise of the grantee to assume and pay such debt is a nudum pactum, without efficacy in favor of either the grantor or the mortgagee.

MORTGAGES—ASSUMPTION OF MORTGAGE DEBT BY GRANTEE—FORECLOSURE.—A grantee of mortgaged premises whose conveyance recites that the land is conveyed subject to the mortgage, and that the grantee assumes and agrees to pay such debt as part of the consideration, is not liable for a deficiency arising upon a foreclosure and sale, unless his grantor was liable, legally or equitably, for the payment of the mortgage.

Kinley & Kinley, for the appellant.

Peak & Ball, for the respondent.

⁴⁹⁶ WILLIAMS, J. Plaintiff held a note secured by a deed of trust upon a lot in Kansas City belonging to one Clark, the maker of the note. Clark conveyed the property subject to said deed of trust to Cowling, but without any assumption by the latter of the mortgage debt. Cowling subsequently transferred said real estate, by warranty deed, to defendant. This deed contains a clause stating that the grantee therein "assumes and agrees to pay" said debt. The property, after the ⁴⁹⁷ conveyance to defendant, was sold under the deed of trust. There was not enough realized to pay plaintiff's note, and, after crediting thereon the proceeds of the sale, he brought this suit to recover the deficiency from the defendant, on the ground that, by accepting the deed from Cowling, defendant assumed and agreed to pay said debt.

This question then is presented: Can a mortgagee recover upon an agreement to assume the mortgage debt inserted in a deed to a remote grantee of the premises, when the grantor in such deed purchased the property subject to the mortgage, but did not agree to pay, and was not liable for such debt?

Judgment was rendered in the circuit court for the defendant, and this was affirmed by the Kansas city court of appeals in a very satisfactory opinion by Smith, P. J. The case was then certified to this court under constitutional requirements, because of a conflict between the decision of the court of appeals and Heim v. Vogel, 69 Mo. 529.

The attention of this court was not directed, in the case last mentioned, to the difference between the liability of a grantee of mortgaged premises upon a clause in his deed assuming the mortgage debt when his grantor was bound therefor, and such liability when there was no obligation to pay upon the part of the grantor. The general proposition was announced, that "where land is conveyed subject to a mortgage, the grantee does not undertake or become bound by a mere acceptance of the deed to pay the mortgage debt; but if a grantee takes a deed containing a recital that the land is subject to a mortgage which the grantee assumes or agrees to pay, a duty is imposed on him by the acceptance, and the law implies a promise to perform it, on which promise, in case of failure, assumpsit will lie." The facts in that case might have ⁴⁹⁸ justified the application of the principle stated by the court of appeals in this case. The question presented here, however, was not discussed, considered, or passed upon. The case was disposed of upon the general rule contained in the above quotation.

Can plaintiff recover upon defendant's implied promise raised

by his acceptance of Cowling's deed, containing a clause binding defendant to assume and pay the mortgage debt? It is well settled that "a person for whose benefit an express promise is made in a valid contract between others may, in this state, maintain an action thereon in his own name": *Ellis v. Harrison*, 104 Mo. 270, and cases cited.

The agreement between the promisor and promisee must possess the necessary elements to make it a binding obligation—in other words, it must be a valid contract between the parties to enable a third person, for whose benefit the promise is made, to sue upon it. A mere naked promise from one to another for the benefit of a third will not sustain an action. Cowling, defendant's grantor, did not owe the mortgage debt and had never assumed to pay it. Defendant's promise was not therefore to indemnify him. As Judge Smith says: "It must be borne in mind that plaintiff's debt was no part of the consideration for the grant from Cowling to the defendant. Cowling conveyed to the defendant his equity of redemption. He had no other or greater interest in the property. The assumption was therefore without semblance of a consideration passing from Cowling to the defendant. It was an independent promise, unsupported by any consideration whatever."

It is said in the notes to *King v. Paige*, 4 N. Y. Ch., law ed., 1052: "Unless the grantor is personally liable for the debt, the promise of the grantee, the purchaser, is held to be a mere nudum pactum, and, of course, without efficacy in favor of either the grantor ⁴⁹⁹ or mortgagee." The court in *Norwood v. De Hart*, 30 N. J. Eq. 412, held that "a mortgagee cannot avail himself of an assumption to pay his mortgage contained in a deed to a subsequent purchaser unless the grantor was personally liable to pay the debt": *Jefferson v. Asch*, 53 Minn. 446; 39 Am. St. Rep. 618; *Morris v. Mix*, 4 Kan. App. 654; *Nelson v. Rogers*, 47 Minn. 103; *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195; *Osborne v. Cabell*, 77 Va. 462. The liability of a grantee of real estate, who has assumed the payment of a mortgage debt upon it, is sometimes placed upon the doctrine of subrogation. The mortgagee is declared to be entitled to enforce for his benefit "all collateral obligations for the payment of the debt, which a person standing in the situation of a surety . . . has received for his benefit." As between the parties to the deed, the grantor becomes the surety, and the grantee the principal debtor. Of course, no such rule could obtain, where the grantor was not, and had never become, bound for the debt.

If plaintiff is to rest his case upon the proposition that he can recover upon the promise of defendant to Cowling as made for his benefit, he is met by the objection that Cowling was in no manner indebted to or connected with plaintiff, and bore no such relation to him as would give Cowling any interest in having the assumption clause inserted in the deed.

Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, involved precisely the same question that is presented in the case at bar. It was ruled that "a grantee of mortgaged premises whose conveyance recites that the land is conveyed subject to the mortgage, and that the grantee assumes and agrees to pay the same as part of the consideration, is not liable for the deficiency arising upon a foreclosure and sale, in case the grantor was not personally liable, legally or equitably, for the payment of the mortgage." This ⁵⁰⁰ court has in several recent opinions cited and approved that case: *Howsmon v. Trenton Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654; *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218; also *Insurance Co. v. Trenton Water Co.*, 42 Mo. App. 118. In *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218, Gantt, C. J., indorsed the following quotation from said opinion: "To give a third party who may derive a benefit from the performance of the promise, an action, there must be: 1. An intent of the promisee to secure some benefit to the third party; and, 2. Some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. . . . A mere stranger cannot intervene and claim by action the benefit of a contract between other parties."

There are decisions in some of the states which sustain plaintiff's position, but the cases which have heretofore been followed by this court, as well, we think, as the better reason and the weight of authority, are to the contrary.

The judgment of the circuit court is therefore affirmed.

Brace, C. J., and Robinson and Marshall, JJ., concur.

VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE
—VENDOR MUST HAVE BEEN LIABLE.—A covenant of assumption made by one to whom the premises were conveyed after several mesne conveyances have intervened since the conveyance by the mortgagor cannot be enforced by the holder of the mortgage, unless the grantor of such covenant had himself assumed the mortgage debt, or made himself personally liable for it by some means: See monographic note to *Klapworth v. Dressler*, 78 Am. Dec. 77, showing

that this proposition has not been unquestioned. See *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467. If a grantee, in a conveyance to him, assumes and agrees to pay the debt of a third person as part of the consideration for his purchase, he thereby becomes liable to such third person although his grantor is not liable for the debt, and no consideration passes to the grantee from either of the other parties. The liability rests solely on the promise: *Enos v. Sanger*, 96 Wis. 150; 65 Am. St. Rep. 38.

CONTRACTS—SUITS UPON BY PERSONS NOT PARTIES THERETO.—It is a well settled doctrine in American law that a third person can maintain an action on a promise made to another in his behalf: Note to *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 305; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Maxcy v. New Hampshire etc. Ins. Co.*, 54 Minn. 272; 40 Am. St. Rep. 325. Much controversy has arisen over this question, but it seems eminently proper that such a suit should be held not maintainable where the promise is void as between the promisor and promisee, for fraud, want, or failure, of consideration: Extended note to *Linneman v. Moross*, 39 Am. St. Rep. 535; nor can it be maintained by one who is a stranger to the consideration: *Linneman v. Moross*, 98 Mich. 178; 39 Am. St. Rep. 528; *Ross v. Milne*, 12 Leigh, 204; 37 Am. Dec. 646.

IN RE KNAUP.

[144 MI SOURI, 653.]

EXECUTIONS — SUPPLEMENTAL EXAMINATION TO DISCLOSE ASSETS—COMMITMENT FOR CONTEMPT.—Under a statute, providing that defendant may be examined in court as to his means and ability to satisfy the judgment, the court has no power to commit him for contempt for failure to obey its order to deliver up bonds, notes, or other personalty which his examination shows he has on his person.

COURTS.—POWER GIVEN TO COURTS TO ENFORCE ORDERS can never reach beyond those made in the legitimate exercise of such power, and never to those orders which it has no authority, by reason of want of jurisdiction, or otherwise, to make.

EXECUTIONS — SUPPLEMENTAL EXAMINATION TO DISCLOSE ASSETS—COMMITMENT FOR CONTEMPT.—Under a statute providing that a defendant may be examined in court as to his means and ability to satisfy a judgment, he may be committed by the court for contempt in refusing to submit to such examination, but not for his refusal or failure to deliver to the court property which his examination has discovered.

EXECUTIONS — GARNISHMENT IN AID OF — COMMITMENT FOR CONTEMPT—IMPRISONMENT FOR DEBT.—Under a statute providing that, if it shall be made to appear that any garnishee had, before his garnishment, executed to any defendant a negotiable promissory note which at the time of the garnishment was unpaid, the court may order the defendant to deliver such note into court, and, upon his failure or refusal to comply with such order, may attach his person, the court may, in garnishment proceedings against a corporation in aid of execution, commit the execution defendant to jail for failure to obey an order of court to deliver to it or to its receiver negotiable bonds of such corporation transferred to him and found to be in his possession under his examination in court as to his means and ability to satisfy the judgment, although it is beyond the power of the court, at the time of such

examination, to commit him for contempt for his refusal to deliver to the court the property then found to be in his possession. Such commitment for contempt in the garnishment proceeding is not an imprisonment for debt.

CONTEMPT—IRREGULAR ORDER.—If the court has jurisdiction in the matter of making an order, and the order as made is irregular or improper in some mere matter of detail, it is still obligatory upon the party against whom it is issued, until set aside or reversed by some appellate court on appeal, and he may be punished for contempt for disobedience of, or resistance to, such order.

CONTEMPT.—THE RIGHT TO PUNISH for contempt disobedience to all lawful mandates of a court is not a mere formal incident to a court, but an inherent power essential to its very existence, and granted as a necessary incident in its establishment.

Silver & Brown, for the petitioner.

W. S. Pope, for the respondent.

638 **ROBINSON, J.** This is an application on habeas corpus, for the discharge from imprisonment of the petitioner, Frederick Knaup, committed to the jail of Cole county for contempt, in refusing to obey an order of the circuit court of that county requiring him to deliver to its receiver certain bonds in petitioner's possession. The facts giving rise to this proceeding have been summarized by counsel as follows:

The Cole circuit court, at its July term, 1897, rendered judgment (on a promissory note) in the sum of three thousand and seventy-three dollars and thirty-five cents against the Standard Shoe Company and Frederick Knaup, codefendants. An execution was, on August 12th thereafter, sued out by the judgment creditor and against the defendants, returnable to the November term, 1897, of the circuit court, and the same was returned to said term unsatisfied except as to the sum of one hundred and eighty-nine dollars and seventy cents, which was realized and applied as a credit on the execution. Afterward, at the November term, 1897, of said court, the execution plaintiff caused the petitioner herein to be examined by the court, under the Revised Statutes of 1889, section 4971, et seq., as to his ability and means to satisfy the judgment. **639** The court, on November 30, 1897, entered its finding on said examination to the effect that the petitioner had in his possession and on his person "three bonds of Cole county of the par value of five hundred dollars each, and five bonds of the Jefferson City Water Works Company of the par value of one thousand dollars each, and a note against the Standard Shoe Company; that all of said property ought to be applied to the payment of said judgment until the same has been satisfied, and that said judgment is a prior lien on

said property." Afterward, on November 30, 1897, the execution plaintiff filed a motion in the circuit court requiring said Frederick Knaup to deliver the Jefferson City Water Works bonds so found in his possession and upon his person into the court. This motion the court on the same day overruled.

Afterward, on said November 30, 1897, the execution plaintiff sued out an alias execution against the defendants, and subsequently on the same day the sheriff of Cole county returned the alias execution, his return reciting service of garnishment process on Fred H. Binder, president of the Jefferson City Water Works Company. Thereafter, and on the same day, the execution plaintiff filed in the circuit court his supplemental petition, in which he set forth in substance the rendition of the judgment for three thousand and seventy-three dollars and thirty-five cents in his favor, the issuance of the original execution thereon and its return unsatisfied except as to the sum of one hundred and eighty-nine dollars and sixty cents, the issuance of the alias execution, and the service of the garnishment on the waterworks company, the examination of said Frederick Knaup under oath by the court, and its finding that he had in his possession and upon his person the bonds as recited by the court in its order, and that they were subject to the payment of plaintiff's judgment. Said petition further sets forth that unless Frederick Knaup should be restrained from ⁶⁰⁰ so doing he would negotiate said bonds and place them beyond the process of the court, and it prayed for a temporary restraining order to prevent said Knaup from negotiating said bonds until the hearing of the garnishment proceedings; that the injunction be then made perpetual, and for the appointment of a receiver to take charge of the securities pending litigation. The court at this hearing entered its order directing the said Frederick Knaup (petitioner herein) to deliver the said Jefferson City Water Works bonds into the hands of the receiver, and, on his refusal to obey said order, adjudged him guilty of contempt and committed him to the jail of Cole county until he should yield obedience thereto. The said Knaup, having been taken into custody by the sheriff of Cole county, brings this habeas corpus proceeding to test the legality of the order.

In the brief filed herein with the court, by the learned counsel for the petitioner, a most interesting discussion, involving the consideration of questions about which the courts of our country are in much confusion, have been presented, such as the authority and power of courts of equity (independent of express

statutory enactments conferring it) to compel a debtor, at the instance of a judgment creditor, whose execution at law has proven unavailing, to turn over to the court or a receiver appointed by the court, under the penalty of imprisonment, notes or other personal chattels in his possession in order that they may be subjected to the satisfaction of the judgment against him; and further as to what is the proper limitation and restriction of a court of equity when invoked as auxiliary to a court of law in the enforcement of its judgments, and other like kindred questions. Also the question as to what extent articles carried or worn about or upon the person of an execution debtor are to be held exempt from seizure on execution or attachment. Also an ⁶⁶¹ elaborate discussion on the constitutional declaration against imprisonment for debt, and the various statutory provisions enacted declaratory thereof. In the view we take of the facts that lead up to and resulted in the order of imprisonment of the petitioner by the circuit court, from the force of which he now seeks by this writ his discharge, there will be no occasion to give to this opinion so wide a range of discussion as is suggested in the brief of petitioner. While the petitioner was brought before the circuit court of Cole county on an order for his appearance and examination touching his means and ability to pay the judgment against himself and in favor of one of his judgment creditors, under section 4971 of the Revised Statutes of 1889, and at that examination he was made to disclose the ownership and whereabouts of the waterworks bonds mentioned above, the order for his imprisonment was not predicated upon the authority of section 4971, but upon section 5243 of the garnishment act. In the case of *State v. Barclay*, 86 Mo. 55, it was said, though the point was not directly involved in the judgment, that section 2410 of the Revised Statutes of 1879, now section 4971 of the Revised Statutes of 1889, under the chapter on executions, did not authorize the court to go so far as to order the defendant to turn over the property to the officer of the court. This obiter expression we regard as the correct view, however, in this state, under that manner of procedure, because, when the statute herein confers special power, or when a special method is prescribed for the execution of a given power, this generally forbids the doing of the thing specified in the particular way pointed out by the statute conferring such power: *Heidelberger v. St. Francois Co.*, 100 Mo. 69, and cases cited. Under the provisions of the execution statute, section 4971 (against which the counsel for petitioner have directed ⁶⁶² so much of

their effort, as if it was the sole authority upon which the circuit court predicated its power to make the order of commitment), the court would have been undoubtedly wanting in power to cause the petitioner, as execution debtor, to deliver up his property, and for lack of that power, an order for his commitment for failure to comply therewith under that statute would have been without jurisdiction and the petitioner might properly have asked for his discharge. The circuit court, recognizing that want of power when the petitioner was first brought before it under section 4971, refused to make its order upon petitioner to deliver the bonds into court under penalty of imprisonment, although urged to do so by the judgment creditor. And here it is conceded that the rule that gives a court the power to enforce its orders can never reach beyond those made in the legitimate exercise of its power, and never to those orders of which it had no authority, by reason of want of jurisdiction, or otherwise, to make. The order which section 4971 authorizes the court to make is, "that the judgment defendant undergo an examination touching his ability and means to pay and discharge the judgment against himself, and in case of neglect or refusal on part of such judgment debtor to obey such order, then to issue a writ of attachment against such debtor, as now provided by law, and to punish him for contempt," et cetera. The authority for the attachment and order of contempt, as will be observed under that section, is for a refusal to undergo an examination, and not for the failure to turn over the property into the hands of the court brought to light by the examination.

But the circuit court did not rely upon the power and provisions of section 4971 in the making of its final order of commitment against the petitioner, although, as above said, it was under that section that ~~663~~ the petitioner was made to disclose, first, the possession and ownership of the bonds of the waterworks company in himself. Garnishment proceedings in aid of an execution against the petitioner had been inaugurated immediately on petitioner's disclosure of the ownership of the bonds, and the waterworks company that had issued its five bonds of one thousand dollars to petitioner, summoned as garnishee. By section 5243 of the garnishment act (Revised Statutes of 1889), it is provided: "If it shall be made to appear that any garnishee had, before his garnishment, executed to any defendant a negotiable promissory note, which at the time of the garnishment was unpaid, the court, or the judge thereof, may order the defendant to deliver the same into court." And further on the section pro-

vides that such order of delivery may be enforced by attachment against the body of the party to whom it is directed. Regularly, such fact as the existence and ownership of a negotiable promissory note or bonds would be made to appear by the answer of the garnishee, but this is not necessarily the case. It is sufficient that such fact be made to appear in any other mode proper in a court of justice. Here the fact of the existence of negotiable bonds, which is covered by the generic terms negotiable promissory note, as used in section 5243, was made to appear to be in possession of and owned by the judgment debtor (the petitioner herein) by his own answer to a legitimate question propounded to him while under examination as an execution debtor, and again reasserted by him in the presence of the court at the hearing of the application filed by the judgment creditor, wherein the existence of his unpaid judgment, the issuance of the execution thereon, and the service of garnishment upon the waterworks company, and the possession and ownership of five of its bonds by petitioner, were all set out with the prayer ⁶⁸⁴ that an order be made upon petitioner, as execution defendant, to deliver into court said bonds as provided in section 5243, and for an order restraining and enjoining the petitioner from negotiating said bonds, and for the appointment of a receiver to take charge of the same pending the hearing of the garnishment proceeding against the waterworks company. The fact that petitioner's ownership and possession of the bonds of the waterworks company was first disclosed to the court at an examination under section 4971, where no authority is given to the court to make an order that petitioner, as judgment debtor, turn over said bonds into the hands of the court, certainly cannot be used as a shield with which to ward off the force of an order made under the provisions of section 5243 of the garnishment act, nor be interposed to protect against the penalty imposed by that section, for the failure to comply with the court's order thereunder. Ignoring section 4971 and all done thereunder, and considering only section 5243, full and ample statutory authority is found, not only for the court's order upon the petitioner to turn over the bonds into the hands of the court, but express authority for its order committing petitioner as for contempt for his refusal to comply therewith is equally as positive.

The petitioner further contends that the appointment of the receiver, on the application of the execution creditor, in the garnishment proceedings, was in excess of the rightful power of the court, and for that reason the petitioner was warranted in re-

fusing obedience to the court's order requiring him to deliver to the receiver the bonds. This contention is untenable. The essence of the order, so far as it concerned petitioner was, that he deliver the bonds in his possession into court to be dealt with according to law. Whether their custodian was to be the clerk of the court, the ⁶⁶⁵ judge of the court, or a receiver named by the court, as an arm thereof to do its office in that particular, is a question about which petitioner cannot be heard to complain in this collateral proceeding. While there is no doubt upon the proposition that a person committed for contempt in disobeying an order, which the court committing him had no legal right to make, may be discharged on habeas corpus, and that all orders or judgments of courts to be enforceable must be grounded upon lawful authority in the court to make them, all that part of an order within the sphere of the court's power that is complete within itself and susceptible of enforcement independent of an unauthorized or unwarranted supplement to said order, is not to be treated as if never made, or held as void, because of the unauthorized or unnecessary supplement made in connection therewith (if such the order appointing the receiver to take charge of the bonds could be so characterized but about which we do not feel called upon here to express an opinion). Certainly, it ought not to be held that one against whom a lawful order has been made (as against the petitioner in this case) by a court having jurisdiction over the person, and of the subject matter, out of which the order for his imprisonment emanated, can be heard to make that objection as an excuse for his disobedience of that part of the order, properly and lawfully directed to him for performance.

This court, in the case of *State v. Bockstruck*, 136 Mo. 335, in answer to the objection made by the defendant therein that the judgment against him was unauthorized by law, in that it required the fine imposed upon him to be paid "to the state of Missouri, for the use of the city of St. Louis," says: "Inasmuch, however, as there was no necessity for the judgment to specify to what purpose the fine should be applied, inasmuch as without any direction in the ⁶⁶⁶ judgment therefor, it was the duty of the sheriff to pay over the fine to the proper representative of the board of public schools of the city of St. Louis, and inasmuch as this is a case of misdemeanor, we shall order the judgment to be amended by striking out the unnecessary words, and as thus amended we affirm it." That is, the unauthorized and unnecessary supplement to the judgment directing that what

use the fine imposed upon defendant should be applied was not deemed so fatal to the judgment as to even justify its reversal on appeal, and much less should such an objection as that made by the petitioners herein be held as availing, when raised in this collateral proceeding by habeas corpus. If the court had jurisdiction in the matter of making the order for the delivery of his bonds, but the order as made was irregular or improper in some mere matter of detail, it was still obligatory upon petitioner, until reversed by some appellate court on appeal, and he could be punished for disobedience of or resistance to such order. The jurisdiction of the court in the matter of its order upon petitioner in the hearing of the proceeding under section 5243, however, rested not upon the question as to what particular offices or officers of the court the bonds held by him were to be delivered, or who was to act as their custodian pending the garnishment proceeding that had been instituted; but upon the fact that he held paper of a designated character that, in the wisdom of the legislature adopting section 5243 of the garnishment act, was thought to be of such a fleeting nature and so easy of disposition that it might be lost if left to the custody of a tardy and reluctant debtor pending the effort by garnishment to subject it to the payment of his debts.

It is further urged that the order committing petitioner to jail was in effect imprisonment for debt, ⁶⁶⁷ within the prohibitory provision of section 16, article 2, of the constitution of 1875, and in contravention of the protective provision of section 8954 of the Revised Statutes of 1889, declaratory thereof. This contention we think likewise wholly without merit. Certainly, it ought not to be seriously contended that the framers of the constitution of 1875, or 1865, when first the clause absolute against imprisonment for debt found its way into the organic law of this state, intended by that provision (couched in language so unlike a death warrant to our courts) the execution and death thereof, as would result by denying to them the right to punish by imprisonment willful disobedience to their lawful orders, whether those orders be for the delivery by an execution debtor of his bonds into the custody of the court, that ultimately may be used to discharge a judgment obligation, or for any other lawful and proper order made. The right to punish for contempt, disobedience to all lawful mandates of a court, is not a mere formal incident to a court, but an inherent power essential to the very existence of a court of record, and granted as a necessary incident in establishing a tribunal as such, the absence of which power in a court

would render lifeless and practically ineffectual that great branch of this, as of all governments. Surely, if so essential a power in our courts was to be stricken down, the framers of our constitution would have chosen more apt words than those contained in section 16 of article 2 of our present constitution, providing "that imprisonment for debt shall not be allowed except for the nonpayment of fines and penalties imposed for violation of law." That is a mere constitutional restriction upon the courts against the enforcement of a given character of judgments against the citizens, but in no sense to be construed as a strike at, or a restriction upon, the exercise of that vital inherent ~~ess~~ power of the courts to enforce any and all lawful orders by imprisonment for contemptuous disobedience thereof. There is no question of imprisonment for debt presented by the facts of this case.

For these reasons we hold that the petitioner is not entitled to his discharge, and hence order that he be remanded to the custody from whence he came, and that the writ be discharged.

Gantt, C. J., Sherwood and Brace, JJ., concur.

Burgess, Williams, and Marshall, JJ., not sitting.

CONTEMPTS—POWER OF COURTS TO PUNISH—LIMITS OF. A contempt of court is a willful disregard of its authority, and may consist of disorderly or insulting language or behavior in its presence tending to disturb its proceedings or impair the respect due its authority, or in disobedience of its rules or orders interfering with the due administration of law: *In re MacKnight*, 11 Mont. 126; 28 Am. St. Rep. 451. The power to punish for contempt, actual or constructive, is inherent in all courts of record, and is essential to the preservation of order in all judicial proceedings: *Note to Hale v. State*, 60 Am. St. Rep. 696. A statute authorizing imprisonment for contempt of orders of court in proceedings supplementary to execution is not unconstitutional: *Elkenberry v. Edwards*, 67 Iowa, 619; 56 Am. Rep. 360, and extended note; but it should be strictly construed: See monographic note to *Lathrop v. Clapp*, 100 Am. Dec. 514. Disobedience of an order made without jurisdiction is not contempt, in legal contemplation, though the court or judge making such order styles disobedience of it a contempt: *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529; *State v. Start*, 7 Iowa, 501; 74 Am. Dec. 278; *Lester v. People*, 150 Ill. 408; 41 Am. St. Rep. 375. On appeal from an order punishing for contempt, the question of the advisability of the court's action cannot be considered. The only question open to review is that of power, and whether or not the act or word punished is in fact a contempt: See monographic note to *Mullin v. People*, 22 Am. St. Rep. 419. On the power of courts to punish for contempt, see monographic note to *Clark v. People*, 12 Am. Dec. 178-186.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

SLATER v. SKIRVING.

[51 NEBRASKA, 108.]

JUDGMENTS—RES JUDICATA.—A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose.

JUDGMENTS—RES JUDICATA.—A judgment in a prior action between the same parties operates in a second action between them upon a different claim or demand, as an estoppel only as to those matters in issue or points controverted upon the determination of which the findings or verdict was rendered.

JUDGMENTS—RES JUDICATA—EVIDENCE OF ISSUES.—In order that a judgment in one action shall operate as an estoppel in another, between the same parties, it must be made to appear, not only that there was a substantial identity of issues, but also that the issue as to which the estoppel is pleaded was actually determined in the former action; and where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit. The burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence, if necessary. Evidence is not admissible in such case to contradict the record.

JUDGMENTS—RES JUDICATA—WHERE THERE ARE SEVERAL ISSUES.—If in one action, the plaintiff alleges several facts, the proof of any of which entitles him to a recovery, and there is a general finding against him, it must be conclusively presumed in another action between the same parties founded upon the same facts that each fact so averred was determined against such plaintiff, whether or not any evidence was offered in the former case in support of each of such facts.

JUDGMENTS BY DEFAULT—ESTOPPEL.—A judgment by default based upon a petition alleging a good cause of action establishes the truth of all the allegations of the petition, except those relating to value and amount of damage; and estops the defendant, in another action between the same parties, from claiming that such judgment was based on perjured testimony.

H. M. Uttley and W. S. Summers, for the appellants.

M. F. Harrington and J. J. Harrington, for the respondent.

¹⁰⁹ IRVINE, C. Skirving brought an action in the district court of Holt county against Slater, Savage & Kelley and one Kemp. A summons was served on Kemp in Holt county, and another, issued to Douglas county, was there served on Slater, Savage & Kelley. Kemp appeared and answered. Slater, Savage & Kelley, who had been sued as a copartnership, appeared specially and procured the service as to them to be quashed. Skirving then amended his petition so as to make the individuals composing the firm of Slater, Savage & Kelley parties defendant, and another summons was issued to Douglas county and there served upon them. Subsequently judgment was rendered by default against Slater, Savage & Kelley, the cause being continued as to Kemp. Slater, Savage & Kelley at the following term of court filed a petition to vacate the judgment under section 602 of the Code of Civil Procedure. ¹¹⁰ The court dismissed this petition and the case was brought to this court by petition in error, where the judgment of the district court was affirmed: Slater v. Skirving, 45 Neb. 594. The statement of the case in that opinion is quite full, and reference may be made to it for further facts. After the affirmance of that judgment the present action was instituted as an original action to enjoin the enforcement of the first judgment, on the ground that it is void. The former petition alleged, in brief, as reasons for vacating the judgment, that it was irregularly obtained, that the petition stated no cause of action, and that jurisdiction was obtained by fraud upon the court and upon these plaintiffs. The present petition alleges these same matters, simply with more detail; and further that the original judgment was procured by perjury. The defendants in this action, by their answer, among other things, plead *res judicata*, the judgment dismissing the petition to vacate the original judgment being relied on as an adjudication of the matters here pleaded. It is on this question that the argument chiefly turns.

A circumstance on which some stress is laid in one brief, and of which complaint is made in the other, is that this court in its opinion in the former case referred to the petition as "a petition in equity." This phrase was inadvertently used. An examination of the opinion shows that the case was treated as it was in fact, a proceeding under section 602 of the code to vacate the judgment. That is a proceeding in the original action, and not a distinct action: *Iler v. Darnell*, 5 Neb. 192. We therefore consider this case from the standpoint of the plaintiffs, regarding it not as a proceeding for the same object as the former, instead thereof

treating the former proceeding as one supplementary to the original case, merely to vacate the judgment, and this as an original action appealing to the general equity powers of the court to relieve against a void judgment. In another point, also, we proceed from the standpoint of the plaintiffs ¹¹¹ and adopt as a correct expression of the law the language of Mr. Justice Field in *Cromwell v. County of Sac*, 94 U. S. 351: "It should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." In considering this case in the light of that rule, we shall assume for present purposes, without now deciding: 1. That the purpose and object of this proceeding are so far different from the purpose and object of the former proceeding that this is to be regarded as an action based on another cause; 2. That, therefore, no matter not actually litigated in the former proceeding was adjudicated thereby by implication so as to prevent its determination here. On the other hand, it follows from the rule stated that any issue in fact litigated and adjudicated between the parties in the former proceeding was so adjudicated therein as to estop the parties from relitigating it here. Proceeding on these lines, it will be observed by reference to the former opinion that in that proceeding there were actually litigated and therein determined the questions now presented as to whether the original judgment was rendered during term time or at a time when the court ¹¹² was actually in session, and whether there was presented such a case of casualty or surprise as to justify relief against the judgment. These matters having been in fact litigated, their determination in the former case adversely to the plaintiffs here bars them from again pre-

senting such matters for determination, because there can be no doubt that the matters complained of justified an order vacating the judgment under the powers conferred by section 602 of the code, and such matters were not only litigated in the former proceeding, but they were pertinent to that proceeding and properly there determined.

In the former proceeding, these plaintiffs also pleaded the facts which they now claim operated as a fraud upon them and upon the jurisdiction of the court. While perhaps such a fraud would render the judgment void, and, therefore, open to collateral attack, and, if so, perhaps the plaintiffs were not compellable to assert such facts in their former petition, and might have reserved them for use in a collateral attack, still there can be no doubt that they constituted "an irregularity in obtaining the judgment," and "fraud practiced by the successful party in obtaining the judgment." These are both grounds for vacating a judgment under section 602 of the code. The facts now pleaded with regard to the fraud were, therefore, properly pleaded in the former proceeding, and, had they been proved, would have compelled a judgment in favor of these plaintiffs.

The proof offered in this action in support of the plea of *res judicata* consists merely of the pleadings, the judgment having been admitted by the reply in form as pleaded in the answer. This judgment recites that evidence was adduced and contains a general finding "that the facts alleged in the petition of plaintiffs are not true." The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment ¹¹⁸ in one action shall operate as an estoppel in a second action, must be made to appear not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined; and where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit (see the learned note of Messrs. Hare & Wallace to the *Duchess of Kingston's case*, in their edition of *Smith's Leading Cases*), and we think that, while the authorities are conflicting, their greater weight is in favor of the view that the burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence if necessary, and not upon the other party to show that an issue which might have been adjudicated was not. But we conceive that sound principle re-

quires that the record should be conclusive so far as it goes, and that extrinsic evidence must be confined to supplementing the record. No evidence is admissible to contradict it. To illustrate: If in the former action the defendant interposed two different pleas and recovered a general verdict, extrinsic evidence would be admissible to show that the verdict was based on one only of these pleas, and that the matter involved in the other plea was not adjudicated, because such evidence merely explains the record, the defendant being entitled to judgment if either of his pleas was good. Again, if the plaintiff sues on two counts stating different causes of action, and the judgment is of such a character that it may have been based on only one count, it is proper to show upon which it was in fact based. But, on the other hand, if the defendant files two pleas, either of which would be good if proved, and the judgment was for plaintiff, then the record shows that both pleas must have been determined adversely to defendant, and to permit extrinsic evidence to show that one plea was abandoned would not supplement the record, but would contradict it. Now, in this case the plaintiffs ¹¹⁴ alleged several facts. If they proved any one of these the original judgment should have been vacated. Therefore, a general finding against them necessarily involved a determination adversely to the plaintiffs of each one of those facts. The plaintiffs could not avoid the effect of the estoppel merely by failing to introduce evidence in support of the particular averment in question. If they did not desire an adjudication of that issue, they should have amended their petition and struck out the averments in support thereof. But the record on these facts requiring an adjudication of this issue in order to justify the judgment rendered, the plaintiffs are bound, whether or not they saw fit to offer evidence in the former action: *Ramsey v. Herndon*, 1 McLean, 450; *Fisk v. Miller*, 20 Tex. 579; *People v. Supervisors*, 27 Cal. 655; *Underwood v. French*, 6 Or. 66; 25 Am. Rep. 500; 2 Smith's Leading Cases, 8th ed., 924; *Freeman on Judgments*, sec. 272. In the text-book cited, the author intimates that the English rule is to the contrary, and that a party may avoid the effect of an estoppel merely by showing that while he pleaded facts which, if proved, would have resulted in a different judgment, he withheld all evidence tending to prove such facts. The cases cited do not support that view. The leading case is *Seddon v. Tutop*, 6 Term Rep. 607. In that case, reliance was not placed on a former determination of the same issue in the pleader's favor. The plea was a former recov-

ery by the adverse party. It clearly appeared that while the plaintiff had taken a default in an action of assumpsit, wherein he had declared in one count upon a promissory note and in another for goods sold and delivered, he had on the inquisition proved only the note. The second action was for the goods. The court held that the first judgment was not a bar. It needs no argument to point out the distinction between pleading a former recovery by one's adversary and pleading a former adjudication in one's favor, but, notwithstanding this distinction, *Seddon v. Tutop*, 6 Term Rep. 607, has been severely criticised in later cases, and the ¹¹⁵ opinion of Lord Kenyon in that case discloses that he was striving for a technical reason to support what he states to be the clear justice of the case. *Hadley v. Green*, 2 Tyrw. 390, and *Deacon v. Great Western R. Co.*, 6 U. C. C. P. 241, are also cases where the plea was former recovery, and are distinguishable upon the same grounds as *Seddon v. Tutop*, 6 Term Rep. 607. We hold that inasmuch as these plaintiffs in the former proceeding pleaded the facts they now allege, and inasmuch as proof of those facts would have resulted in a determination in their favor, the finding and judgment having been against them, the record conclusively establishes an adjudication of the present issues whether or not any evidence was offered in the former case in support of the issues.

This leaves for consideration merely the allegation that the former judgment was procured by perjury. This was not pleaded in the former proceeding, and assuming, as we do, that this is an action for a different object and that it comes within the second branch of the rule in *Cromwell v. Sac County*, 94 U. S. 351, the plea of *res judicata* will be assumed not well taken on this issue. But it appears from the record that the original judgment was rendered against these plaintiffs by default. It was held in the former case that the petition stated a cause of action against them. There was, therefore, nothing in issue, except the amount of damages, while the perjury now pleaded relates not to the amount of damages, but to the cause of action. The cause of action stood confessed when the judgment was rendered, and while perhaps testimony was taken in support thereof, still the judgment could not have been procured by perjury, because no evidence was necessary to entitle the plaintiff to judgment. There is no implied denial of the allegations of the petition except as to the allegations of value. If an answer had been filed, every averment in the petition not controverted by the answer would be taken as true: Code

Civ. Proc., sec. 134. While we are aware that in some quarters an impression prevails that on default ¹¹⁶ it is necessary for the plaintiff to prove his cause of action, this impression is unfounded in law. If it were true, a failure to answer would operate as a general denial and a party answering would be in a worse plight than one in default. The necessity for proof on default arises only from the last provision of section 134, that allegations of value or of amount of damages shall not be considered as true by failure to controvert them. Except as to the amount of damages, Skirving was, on the default of the defendants in the original action, entitled to judgment without evidence, and the record therefore shows that judgment could not have been based on false or perjured testimony except as to its amount, to which it is not alleged that the perjury related. It follows that the judgment of the district court must be affirmed.

JUDGMENTS—RES JUDICATA—EVIDENCE.—The conclusiveness of a judgment as between the parties to it is not confined to the matter litigated, but includes the finding of any facts which were in issue and necessarily decided: *State v. Branch*, 134 Mo. 592; 56 Am. St. Rep. 533, and note; *Short v. Taylor*, 137 Mo. 517; 59 Am. St. Rep. 508, and note; *White v. Sherman*, 168 Ill. 589; 61 Am. St. Rep. 132. A judgment is conclusive if on a direct point, though the object of the two suits is different: *Gallaher v. Moundville*, 84 W. Va. 730; 26 Am. St. Rep. 942. If several issues are presented by the pleadings, and the record fails to show upon which in fact the judgment was rendered, it is competent to show that fact by evidence aliunde, not to contradict the record, but in support of it: *Emlden v. Lisherness*, 89 Me. 578; 56 Am. St. Rep. 442, and note. One who relies upon the existence of a judgment estoppel must assume the burden of proof and satisfy the trial tribunal or the jury that the matter has already been decided in the manner which he claims: See monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 563, on the proof of *res judicata*.

JUDGMENTS BY DEFAULT—CONCLUSIVENESS.—A judgment by default, after service of summons and complaint and failure to answer, admits the truth of every material matter alleged in the complaint: Note to *Lincoln Nat. Bank v. Virgin*, 38 Am. St. Rep. 752. It is a mere admission of the cause of action, leaving the rights of the parties to be determined upon defendant's motion to be heard in damages: *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 236, and note.

HENRY v. STATE.

[51 NEBRASKA, 149.]

HOMICIDE—MURDER IN PERPETRATION OF FELONY. To sustain a conviction of murder in the first degree, under a statute providing that any person who, while engaged in the perpetration of a felony, kills another, shall be deemed guilty of murder in the first degree, it is not essential that the killing be such as, in the absence of such statute, would amount to murder, as distinguished from manslaughter.

CRIMINAL LAW.—AN ALIBI IS A LEGITIMATE DEFENSE, and should not be disparaged by the trial court, the sufficiency of the evidence for the purpose of establishing such defense being a question of fact for the jury.

CRIMINAL LAW—ALIBI—DISCREDITING.—It is error in a criminal prosecution for the trial court, by means of cautionary instructions, to discredit a particular defense, such as an alibi, or the evidence in support thereof, by stating to the jury that such defense is one "capable of being, and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance."

CRIMINAL LAW—ALIBI—DEFENSE OF.—PROOF OF an alibi is not required to cover the entire period within which the offense might possibly have been committed. The accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jury a reasonable doubt of his presence at the commission of the offense with which he stands charged.

TRIAL—INSTRUCTIONS.—The giving of inconsistent and contradictory instructions with respect to a material issue is reversible error.

JURY TRIAL—ERRONEOUS INSTRUCTIONS are not cured by merely giving others on the same subject contradicting them. This rule is especially applicable to the case of an erroneous specific direction following a correct general instruction.

R. D. Sutherland, C. E. Bush, and J. E. Bush, for the appellant.

C. J. Smith, attorney general, and E. P. Smith, deputy attorney general, for the state.

¹⁵⁰ POST, C. J. The plaintiff in error, William Henry, was by the county attorney of Jefferson county, jointly with one Zimmerman, charged with the crime of murder in the first degree. A change of venue was, on his motion, allowed to Gage county, where a separate trial was had, resulting in a verdict of murder in the second degree and sentence to imprisonment in the penitentiary for a term of ten years, which judgment it is sought to reverse by means of this proceeding. The information, in apt language, charges the defendants therein with fatally shooting the deceased, Russel S. Graham, purposely and of their deliberate and premeditated malice, with intent him, the said Graham, thereby to kill and murder.

¹⁵¹ The first assignment of error to which our attention is directed by the argument of counsel for plaintiff in error relates to the giving of the following instruction on the court's own motion: "The court instructs you that the crime of murder in the first degree is committed when a person of sound memory and discretion unlawfully, purposely, and with deliberate and

premeditated malice, Kills another person in the peace of the state, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, shall unlawfully kill another person in the peace of the state. In this case, if you find from the evidence, beyond a reasonable doubt, that the defendant William Henry unlawfully, purposely, and of deliberate and premeditated malice, killed Russell S. Graham, on or about the fifth day of June, 1895, in the county of Jefferson and state of Nebraska, or if you find from the evidence, beyond a reasonable doubt, that in the perpetration, or attempt to perpetrate, a robbery or burglary, William Henry unlawfully killed Russell S. Graham, on the fifth day of June, 1895, in the county and state aforesaid, in the manner and form charged in the information, then you should find the defendant guilty by your verdict, and in that event you should find by your verdict what the penalty shall be, whether the defendant shall suffer death or shall be imprisoned in the penitentiary during his natural life." The contention of counsel, as we understand their position, is that in order to authorize a verdict of murder in the first degree, when the homicide is shown to have been committed in the perpetration, or attempted perpetration, of a rape, robbery, arson, or burglary, it is not sufficient that the killing be unlawful in the sense that it would, in the absence of the statute hereafter cited, warrant a conviction on the charge of manslaughter, but must be such as to amount to murder in the first or second degree. In other words, they contend that so much of section 8 of the Criminal Code as provides that if any person "in the perpetration, or attempt to perpetrate, any rape, robbery, arson, or burglary ¹⁵² kill another, every person so offending shall be deemed guilty of murder in the first degree," should be construed to mean if any person murdering another, et cetera. But to that argument a sufficient answer is, that the legislature has not so enacted, but has, on the contrary, declared that whoever kills another in the perpetration, or attempted perpetration, of either of the enumerated felonies shall be deemed guilty of murder. In so doing the legislature has, in the language of an eminent exponent of the criminal law, merely drawn its lines around the particular combination thus included under a penalty: 1 Bishop's Criminal Law, sec. 776. "Where," as said by the same author, "the law forbids a defined combination of act and intent and provides a penalty for the violation of the inhibition, it establishes a distinct or specific crime": 1 Bishop's Criminal Law, sec. 599. With such frequency has the

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rule as thus stated been applied in the administration of the criminal law that its soundness may be said to be generally recognized in this country: *Smith v. State*, 34 Neb. 689; *Graves v. State*, 45 N. J. L. 204-358; 46 Am. Rep. 778; *Moynihan v. State*, 70 Ind. 126; 36 Am. Rep. 178; *Buel v. People*, 78 N. Y. 492; 34 Am. Rep. 555.

Although the evidence has not been preserved by means of a bill of exceptions, it is apparent that there was an attempt to establish an alibi, and with respect to which the court, in general terms, charged that it was sufficient for the purpose of the defense relied upon if the jury, from a consideration of all the evidence, entertained a reasonable doubt of the presence of the accused at the commission of the homicide. It also, at the request of the state, gave the following instructions, which are now assigned as error:

"9. The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing, as it does, that the party asserting it could not have been present at the time of the homicide, and therefore did not participate in it, is, when credited, a defense of the most conclusive and satisfactory character. The fact, however, ¹⁵³ which experience has shown, that an alibi, as a defense, is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance. These are considerations attendant upon this defense which call for some special suggestions upon the part of the court. These are that while you are not to hesitate at giving this as a defense full weight, that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitles the defendant to an acquittal, still you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you.

"10. The court instructs you that the defendant, William Henry, to establish an alibi, must not only show that he was present on the south side of the Republican river, between the towns of Franklin and Riverton, in Franklin county, state of Nebraska, at the time when the murder was committed at Bower postoffice, Jefferson county, Nebraska, but also that said William Henry was at some point between the said towns of Franklin

and Riverton, in Franklin county, Nebraska, such a length of time that it would be impossible for him to have been at Bower postoffice, Jefferson county, Nebraska, where the murder was committed.

"11. The court instructs you that a defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed."

The inquiry, in the absence of a bill of exceptions, is whether the foregoing instructions are applicable to any evidence admissible to support the charge of the information. ¹⁵⁴ It was said in *Casey v. State*, 49 Neb. 403, that an alibi is a legitimate defense and should not be disparaged by the trial court, the sufficiency of the evidence for the purpose of establishing such defense being a question of fact for the jury. We are aware that instructions in substantially the language employed in paragraph No. 9 have received the approval of courts of the highest standing. We are, however, unable to conceive of any sound reasons for cautionary instructions with respect to an alibi which do not apply with equal force to any other defense. Although it is true, as said by the district court, that an alibi "is a defense which has been frequently fabricated, that even when wholly false its detection may be difficult, and that the temptation to resort to it as a spurious defense may be great," it is a fact, abundantly attested by the observations of every judge experienced in the administration of the criminal law, that attempts to fabricate self-defense as a justification, or to simulate insanity as an excuse, are not less frequent or successful than like impositions with respect to an alibi. Instruction No. 9 would, it is conceded, be defensible in those jurisdictions where it is permissible, in charging the jury, to comment upon the evidence. But that it is within the province of the judge under our practice, by means of cautionary instructions, to discredit a particular defense or the evidence in support of a particular proposition we cannot admit, since witnesses are by no known rule of law or logic presumed to be less truthful simply because they testify concerning an alibi. In *Sater v. State*, 56 Ind. 378, it is said of an instruction of similar import that, "taken altogether, it tends too strongly to cast suspicion upon an alibi as a defense, and to prejudice the minds of the jury against such defense. It seems to have been intended, too, by it to lay

down a more rigorous rule for the consideration of evidence tending to prove an alibi than was required as to the other evidence in the cause": See, also, to the same effect, *Line v. State*, 51 Ind. 172; *Spencer v. State*, 50 Ala. 124; *Simmons v. State*, 61 Miss. 243; *Nelms* ¹⁵⁵ *v. State*, 58 Miss. 362; *Dawson v. State*, 62 Miss. 241; *Murphy v. State*, 31 Fla. 166; *People v. Kelly*, 35 Hun, 295.

We are also of the opinion that the court erred in giving instructions numbered 10 and 11, by which the burden was imposed upon the accused of proving his presence in Franklin county for such length of time that it was impossible for him to have been present at the commission of the homicide. It follows logically, if not necessarily, from the decision of this court that the proof of an alibi is not required to cover the entire period within which the offense might possibly have been committed, but that the accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged: *McLain v. State*, 18 Neb. 154; *Casey v. State*, 49 Neb. 403. See, also, *Kaufman v. State*, 49 Ind. 248; *Stuart v. People*, 42 Mich. 255; *Pollard v. State*, 53 Miss. 410; 24 Am. Rep. 703; *State v. Jaynes*, 78 N. C. 504; *Albritton v. State*, 94 Ala. 76; *Caffery v. State*, 94 Ala. 76; *Bennett v. State*, 30 Tex. App. 341; *Beck v. State*, 51 Neb. 106. The attorney general, while not defending the instructions to which the foregoing criticism is directed, argues that the giving thereof is at most error without prejudice, in view of the fact that the rule was correctly stated in the general charge of the court. It is true, as counsel contend, that instructions should be construed together, and if, when so considered, they fairly embody the law of the case, the fact will afford no ground for reversal that one or more of the expressions used, separately construed, might appear to be erroneous: *St. Louis v. State*, 8 Neb. 405; *Murphy v. State*, 15 Neb. 383; *Lincoln v. Smith*, 28 Neb. 762; *Debney v. State*, 45 Neb. 856. The rule thus stated is, however, but a modification of the doctrine recognized in all jurisdictions, that the giving of inconsistent and contradictory instructions with respect to a material proposition is reversible error, since it is, in general, impossible ¹⁵⁶ to determine whether the jury in their deliberations have followed the good or the bad one. Or, to use the language of *Norval, J.*, in *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290: "An erroneous instruction is not cured by the mere giving of

another on the same subject contradicting it." To the same effect, also, are *Wasson v. Palmer*, 13 Neb. 377; *Frederick v. Ballard*, 16 Neb. 559; *Carson v. Stevens*, 40 Neb. 112; 42 Am. St. Rep. 661. And the rule applied in the cases cited is especially applicable to the case of an erroneous specific direction following a correct general instruction: *Pittsburgh etc. R. R. Co. v. Krouse*, 30 Ohio St. 222. The giving of instructions 10 and 11 is error requiring a reversal of the judgment, whatever may have been the evidence tending to prove the alibi relied upon, since to no conceivable state of facts can the direction therein be held applicable.

Reversed.

HOMICIDE IN PERPETRATION OF FELONY—FIRST DEGREE.—The weight of authority is in favor of the position laid down in the principal case that where a homicide, which would be murder at common law, is perpetrated by any of the means mentioned in the statute, or in the commission of any of the enumerated felonies, it is murder in the first degree, without further evidence of willfulness, deliberation, or premeditation: See monographic note to *Whiteford v. Commonwealth*, 18 Am. Dec. 786.

CRIMINAL LAW—ALIBI AS DEFENSE—INSTRUCTIONS.—The proof of an alibi in a criminal case is sufficient when it satisfies the jury, with reasonable certainty, that the accused was not present when the crime was committed: *Miles v. State*, 93 Ga. 117; 44 Am. St. Rep. 140; *Prince v. State*, 100 Ala. 144; 46 Am. St. Rep. 28, and note; *State v. Jackson*, 36 S. C. 487; 31 Am. St. Rep. 890, and note. Where there is reasonable doubt of the defendant's guilt, he should be acquitted: *State v. Ardoin*, 49 La. Ann. 1145; 62 Am. St. Rep. 678, and note. Whenever an instruction has been given which clearly casts discredit upon the defense of alibi, and it appeared possible that it could have prejudiced the accused, and aided in his conviction, the appellate court has granted him a new trial: See monographic note to *Sharp v. State*, 14 Am. St. Rep. 43.

JURY TRIAL—INSTRUCTIONS—CORRECT MINGLED WITH INCORRECT.—While an inaccurate or incomplete instruction may be cured by subsequently supplying the defect or accurately stating the law, an absolute misstatement of the law is not cured by a correct statement elsewhere in the charge: *State v. Ardoin*, 49 La. Ann. 1145; 62 Am. St. Rep. 678, and note.

CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY v. CURTIS.

[51 NEBRASKA, 442.]

RAILROAD COMPANIES—DUTY TO TRANSPORT CARS OF OTHER ROADS.—Railroads, as common carriers, must receive and transport the cars of other roads when tendered under proper conditions and when the gauge is suitable and the cars offered are not defective, out of repair, or of such construction in whole or in any particular as to be unreasonably dangerous to those who are obliged to work on or handle them.

RAILROAD COMPANIES—NEGLIGENCE—BUFFERS.—It is not negligence for a railroad company to receive and transport the cars of another company which are equipped with double buffers, while its own cars are equipped with single buffers.

RAILROAD COMPANIES—COUPLINGS—RISK ASSUMED BY EMPLOYEES.—If a car belonging to a connecting carrier is equipped with double buffers, that fact is open, apparent, and obvious. An experienced brakeman who attempts to make a coupling with such car assumes the risks attendant thereon, although the cars in general use on the railroad where he is employed and where he attempts to make the coupling are equipped with single buffers.

RAILROAD COMPANIES—RELEASE OF DAMAGES.—An agreement by an employé of a railroad company, upon becoming a member of its relief department, that an acceptance of benefits from the relief fund shall release the company from liability for damages in case of injury, is valid and binding upon an employé who voluntarily signs such agreement and accepts such benefits. It estops him from suing the company for damages.

DAMAGES.—RELEASE of a claim for damages for injury received through negligence, even if obtained by fraud, is valid until disaffirmed by tendering back the consideration received.

J. W. Dewesse and A. W. Agee, for the appellant.

W. H. Woodward, for the respondent.

⁴⁴⁵ HARRISON, J. The defendant in error instituted this action in the district court of Jefferson county to recover damages alleged ⁴⁴⁶ to have resulted from injuries received by him in an attempt to couple together two freight-cars of a company other than the plaintiff in error, which were being, or to be, transported over the line of road or a portion thereof of the plaintiff in error, and which had on them what were known as double deadwoods or buffers. These double deadwoods were pieces of timber faced with iron, attached on each side of the drawbar, and extended out from the car as far as the drawbar, so that they were flush with the end or head of the drawbar into which the coupling link was to be inserted in making the coupling. The defendant in error's right hand was caught between the deadwoods and so bruised and mashed that amputation thereof was thought necessary and was performed. Defendant in error was awarded a verdict and judgment in the district court, and the company has prosecuted error proceedings to this court.

The main allegations of the petition filed for defendant in error were, in substance, that cars equipped with double deadwoods were so difficult to couple, and the act of coupling them so dangerous to persons undertaking it, that it was negligence for the company to receive them for transportation on its road; that having received them, it was the duty of the company,

when it called on the defendant in error to couple them, to notify him of the peculiarity of the construction of the cars and direct his attention to the double deadwoods; that the failure to give such notice was actionable negligence; also that it was the duty of the company to furnish him with a coupling-knife, in use for making couplings of cars having double deadwoods, with which to make the coupling; that this was not done, which was negligence on the part of the company, which rendered it liable for the consequent injuries to defendant in error. The double deadwoods were referred to and described as follows: "These two freight-cars aforesaid had attached to them, where the coupling was made, what is known by railroad men as 'man-killers' or deadwoods, described as follows: The ⁴⁴⁷ thickness and depth of said 'man-killers' and deadwoods are each about six inches, the width of each about nine inches, and the height or length of each is about sixteen or eighteen inches, and the width of the drawbar is about ten inches, making the width from outer edge to outer edge of said 'man-killers' about three feet. The height or depth of the drawbar is about eight inches, making the height or depth of said 'man-killers' about sixteen or eighteen inches."

The answer of the company admitted that defendant in error was injured at the time, place, and in the manner alleged, but of the extent of the injuries alleged a want of knowledge, and demanded proof, and joined issues as to all the other material facts pleaded in the petition. It was affirmatively stated in the answer, in substance, that cars equipped with double deadwoods were reasonably safe, and had been in use for many years on many lines of railroad engaged in interstate transportation; that the two cars which the defendant in error attempted to couple together were tendered to and received by the plaintiff in error in the regular course of the business of interstate shipments, and that it was compelled to accept and transport them over its line of road; "that the situation and use of the double deadwoods on these cars was plain to be seen, and the defendant alleges that whatever injury the plaintiff sustained at said time and place said injury was caused by his own carelessness and negligence and without any fault of this defendant." As a further defense, it was stated that there had been organized and was in existence what was called and known as the "Burlington Voluntary Relief Department," of which the defendant in error was a member, and on account of such membership was entitled to certain benefits or payments, in the way

of support and maintenance while injured, or sick at any time during his employment by plaintiff in error; that the company had guaranteed the funds necessary, if any, over and above the regular stated contributions of members to pay all calls on the funds to ⁴⁴⁸ meet their designated purposes. (For an extended statement of the plan of this relief department, see *Chicago etc. R. R. Co. v. Bell*, 44 Neb. 44.)

It was further pleaded in this connection: "That in becoming a member of said association, in consideration of the defendant company agreeing to guarantee the necessary funds for the payment of the expenses of the relief department, and of the dues and claims arising on account of such membership, the plaintiff contracted to and with the said association and company to release the said railroad company from all liability on account of any accident where the plaintiff accepted benefits due to him by reason of such accident and on account of his membership in said association, specifying in his application for membership as follows:

"I also agree that in consideration of the amounts paid and to be paid by said company for the maintenance of the relief department, the acceptance of benefits from the said relief fund for injury or death shall operate as a release and satisfaction of all claims for damages against said company arising from such injury or death, which would be made by me or my legal representatives."

"That shortly after the injury to the plaintiff, he made application to the said relief department for the benefits accruing to him on account of his disability resulting from said injury, and he was duly paid the full amount of benefits accruing to him on account of his membership in said relief department for such disability, from month to month, in accordance with his contract of membership, and he received the said the money as benefits accruing to him on account of his membership in said relief department, which money was paid by the defendant company on account of its guaranty for the furnishing of the necessary funds; that at said time, and prior thereto, the relief department funds fell far short of the amount necessary to satisfy the claims justly due to various sick and injured employes, on account of their membership in said relief department; and the defendant railroad company ⁴⁴⁹ furnished the money for carrying out the terms and conditions of the relief department benefits, in accordance with the contract with the plaintiff, as well as the other employes who were members in said depart-

ment; the exact amount paid by the railroad company for such period the defendant is not at this moment advised." The aggregate or total of the sums paid to defendant in error was also stated.

In a reply the defendant in error denied all new matter set up in the answer; admitted the existence of the relief department, his membership in the same, and his reception of benefits after he was injured. Of the amount received he was not advised and could not definitely state, and among the reasons why this receiving the payment should not bar him of this action, it was pleaded that "plaintiff further alleges the fact to be that before he could engage in the services of said company he was required and compelled to join said Burlington Voluntary Relief Department and become a regular member thereof."

At the first offer of evidence, an objection to the introduction of any was interposed for the company on the ground that the petition was insufficient—did not state a cause of action. This was overruled, and such action of the trial court is of the errors assigned and presented. When objection is made, during a trial, that the petition is defective, in that it does not state a cause of action, the pleading will be liberally construed, and, if possible, sustained: *Marvin v. Weider*, 31 Neb. 774. Read and interpreted within the foregoing rule, the petition stated a cause of action in that it raised a question of whether a coupling knife should have been furnished to defendant in error to use when called on to couple cars on which there were double buffers; also, whether or not the equipment of cars with double deadwoods made the act of coupling so dangerous as to constitute it negligence per se to have them on the line of road or to receive them and transport them, as to all the employees who were required ⁴⁵⁰ to couple them together while they were in transit; and, further, whether the company had been negligent in not notifying defendant in error of the presence of these cars and the difference in construction in regard to buffers from those in general use on its line.

There were assignments of error which make necessary an examination of the evidence in connection with the allegations of the pleadings in the light of the rules of law applicable to the points and questions raised, and which have been discussed by counsel. This we will now attempt to do. The first question which it seems proper to notice in regular order is, What was the duty of the railroad company in regard to the reception

for transportation of the cars of other lines tendered to it for such purpose? In some states, this matter has been regulated by constitutional provision, in others by statute, and in others been held to be a part of the duty of a railroad as a carrier. It was said on this subject in the decision in the case of Louisville etc. R. Co. v. Boland, 96 Ala. 626: "It may be said it is a matter of common knowledge that the demands and exigencies of commerce require in the transportation of freight that the cars of one company shall be hauled over the road of another, and that, in order to meet this demand, the gauge of the tracks of the great trunk lines have been made uniform. This necessity has been recognized and provided for by statute in many of the states, including Alabama. Section 21 of article 14 of the constitution, and section 1165 of the code of 1886, carrying the same into effect, make it mandatory on railroads, when required, to transport or draw over its line the passengers, freight, or cars of any intersecting or connecting road, on reasonable terms, provided such cars are adopted to the gauge of its track, are sufficiently strong, and otherwise in proper condition for safe transportation." In the opinion, written by Cooley, J., in the case of Michigan Cent. Ry. Co. v. Smithson, 45 Mich. 212, is the following statement: "The primary fact that must rule this controversy is that ⁴⁵¹ the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight-cars which are offered to it for the purpose and which are upon wheels adapted to its gauge. It is compelled to do so, first, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to anyone. It is compelled to do so, second, by its own interest. To attempt to stop every car offered to it at its termini, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business for which it must increase its charges to make up, if possible, for what it would lose. But, third, the statute itself requires it. It is provided by General Laws of 1873, page 99, that 'every corporation owning a road in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation.' The neces-

sities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the state to punish could hardly fail to be speedy and effectual."

In the case of *Thomas v. Missouri Pac. Ry. Co.*, 109 Mo. 187, it was observed: "Now, as to the second point proposed for discussion: The constitution of this state declares (Const., art. 12, sec. 13): 'Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad, and shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.' And section 2626 of Revised Statutes of 1889 is but a legislative declaration of the same mandate. It will be observed ⁴⁵² that this language is mandatory. Under its terms it becomes the imperative duty of every railway company in the state to 'receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.' Of course, this language, under the operation of a familiar principle, is to receive a reasonable construction, and such construction would obviously exclude damaged cars and cars out of repair, but not those whose construction or coupling apparatus differs from those belonging to or operated by the defendant company. Now, negligence is the result of a failure to perform a duty. From this premise it follows that no course of conduct can justly be termed 'negligent' which results from a simple performance of a duty enjoined by law, to wit, the reception and transportation of cars from other roads." In Iowa, where a statutory provision prevailed, a similar ruling has been made. It was said: "It must be borne in mind that the question is, whether it is negligence for the defendant to receive and transport cars of other roads in general use, and in the ordinary course of business, which are not constructed with the most approved appliances. Public policy has some bearing on this proposition. It is undoubtedly of great importance to the trade and commerce of the country that a car once loaded should go through to its destination without breaking bulk. It is unnecessary, it is believed, to enlarge on this point, as its importance will be readily acknowledged. Suppose, then, the Union Pacific Railroad Company should deliver a car constructed as these were to the defendant, which was loaded with merchandise destined for New York, and as provided in the code, section 1292, and in strict accord therewith request the defendant

to transport the same, would the defendant be bound to receive such car, and for a refusal would it be liable in damages, the only ground of refusal being that it was dangerous to its employes to transport such a car, while, on the other hand, it would be shown that cars so constructed were in use on all other roads? It is sufficient ⁴⁵³ to say that it admits of great doubt whether such a defense should be permitted to prevail": *Baldwin v. Chicago etc. R. Co.*, 50 Iowa, 680. A like doctrine has been announced in Illinois, without statutory provision: See *Indianapolis etc. R. Co. v. Flanigan*, 77 Ill. 365; *Toledo etc. R. Co. v. Black*, 88 Ill. 112. "Even in the absence of any statute or special contract regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them": *Mackin v. Boston etc. R. R. Co.*, 135 Mass. 201; 46 Am. Rep. 456; *Vermont etc. R. R. Co. v. Fitchburg R. R. Co.*, 14 Allen, 462; 92 Am. Dec. 785.

In section 4, article 11, of our constitution it is provided: "Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." This constitutional provision, giving it a fair and reasonable construction, is broad enough to include the transportation of cars of one company over the line of another, and cast the duty on a railroad, when cars of another road are tendered, of receiving and transporting them where the gauge is suitable, and the cars offered are not defective, out of repair, or of such construction in whole or in any particular as to be unreasonably dangerous to those who might be obliged to work on or to handle them: See *Peoria etc. R. R. Co. v. Chicago etc. R. R. Co.*, 109 Ill. 135; 50 Am. Rep. 605. Moreover, aside from the constitutional requirement, we think on principle it must be said that railroads, as common carriers, must receive and transport cars of other roads, when tendered under proper conditions: *Vermont etc. R. R. Co. v. Fitchburg R. R. Co.*, 14 Allen, 462; 92 Am. Dec. 785; *Mackin v. Boston etc. R. R. Co.*, 135 Mass. 201; 46 Am. Rep. 456; *Indianapolis etc. R. R. Co. v. Flanigan*, 77 Ill. 365; *Toledo etc. R. Co. v. Black*, 88 Ill. 112. It was not claimed that these cars were defective, or that they were not in good repair. One branch of the complaint was that the receiving and transporting ⁴⁵⁴ of cars having attached to them double buffers constituted negligence. Far the greater number of freight-cars belonging to and in daily use

on the western railroads, and in this state, have on them what are known as "single deadwoods" on each end of a car, and immediately above the drawbar, attached horizontally, a block or piece of timber about two feet in length, about four inches thick, and four or five inches in height. On these the drawbars extend beyond the deadwoods several inches, and when the cars are to be coupled the drawbars are expected to meet as the one car is pushed up to the other, and bear the immediate effect of the consequent shock. If a drawbar is weak or out of repair, and gives way when a coupling is being made, or if for some reason the drawbars do not strike, but pass each other, as they sometimes do with the single buffers, there is danger to the life of the employé engaged in effecting the coupling.

The evidence in this case disclosed that in coupling cars having double deadwoods there was more hazard to the arm and hand than in performing the same work with those having single buffers; that the double buffers furnished greater security to life than the single; also, that coupling cars by hand by the use of the link and pin, whether equipped with single buffers or double deadwoods, is at best a hazardous undertaking, and one which requires care. It was further shown that freight-cars with double buffers, similar in construction to the ones on these cars, were in general use by some of the long lines of railway and freight lines, and it was not shown that they have been discarded or prohibited by any. The defendant in error was about twenty-seven years old at the time he was injured, and had been "railroading" some six or seven years; had worked on several different railroads, also as a switchman in the "terminal" yard at Kansas City; had heard of cars with double deadwoods; did not remember to have seen or worked on or about any such cars; had heard the double deadwoods called "man-killers"; knew that they were carried over any and all ⁴⁵⁵ railroads of the country. It appears that there is to the drawbar ordinarily used on freight-cars what is called a head — "the drawhead." This is at the end distant from the car, and is hollow, to allow the insertion of the link, which is used to connect the cars. A few inches back toward the car the drawbar has a hole through it, into which fits a pin, which extends down through the drawbar and link, thus effecting the coupling. It appears that frequently, when cars are to be coupled, the pin is "set" in such manner and position in or on the drawbar of one of the cars to be coupled that when the cars are brought together the jar which results when the ends of the drawbars

strike causes the pin to drop into place and finish the coupling. About 8 o'clock, in the evening of October 15, 1891, in Woodlawn, a station in this state, on the line of the plaintiff in error, the defendant in error attempted to couple the two cars on which were the double deadwoods. They were on a side-track or switch, and one had been attached to the train of cars, at the head end of which was the engine. The defendant in error states that he stepped up to the detached one and set the pin, preparatory to coupling, gave the signal to the engineer to "back up"—the cars were at the time about fifteen feet apart—and when they were brought together his hand, which he had raised and directed the link in its proper direction, was caught between the buffers and mashed. In this connection, we will call attention to portions of the evidence which have a bearing on the question of the care which was exercised by defendant in error at the time he received the injury. He stated that he went to the car and set the pin, and we will now quote from the evidence:

Q. Describe it. A. I set it in the hole so when the link came in it shook the pin down through the link.

Q. This drawbar is between the deadwoods? A. Yes, sir.

Q. You was on the outside about even with the deadwoods?
456 A. Yes.

Q. Now, then, you went there, did you, with the pin in your hands when you went between them? A. I set the pin.

Q. Did you take the pin in with you? A. No, sir.

Q. The pin was in the drawbar? A. I think so, or else on the deadwood.

Q. How did you manage to set the pin in the hole through the drawbar? A. I reached over the top and set it.

Q. You reached over the deadwood? A. If you come to the end of the car you can see on the face of the drawbar to set your pin.

Q. You stepped in there by the side of the drawhead and took up the pin and set it in the hole? A. Yes, sir.

Q. Could you see where you was putting the pin? A. Yes, sir.

Q. You could see the end of the drawbar? A. Yes, sir.

Q. Did you hold your lantern where you could see it? A. Yes, sir.

Q. And these deadwoods, too? A. I don't remember of seeing the deadwoods; I wasn't looking for them.

Q. You didn't pay any attention to see whether they were there or not? A. No, sir.

. And further on this subject:

Q. You set the pin in this stationary car before the others began to move back? A. Yes, sir.

Q. So you went in there by the stationary car and fixed your pin in the hole in the drawhead between these two deadwoods before you signaled to the engineer to back up? A. Yes, sir.

⁴⁵⁷ Q. After doing that you signaled him to back up? A. Yes, sir.

Q. When he backed up what did you do? A. I stepped up to this car and took hold of the rod for a hand hold.

Q. With your left hand? A. Yes, sir; the lantern was in my left hand.

Q. With your back to the moving train? A. Yes, sir; my back or side. I don't know which you want it. It wouldn't be exactly my back. I was standing in this shape.

Q. You say you would be standing angling toward the car that was approaching, your back toward that car and face toward the drawhead of the stationary car? A. Yes, sir.

Q. As it came back you caught the link with your hand? A. Yes, sir.

Q. What did you do? A. I held it until I thought it was close enough to go in the drawbar and then I took my hand out, but didn't get it out quick enough.

On page 20 plaintiff is asked:

Q. Did you look to see what kind of a car you coupled? anything about it—what kind of a coupling it was? A. No, sir; that wasn't my business.

Q. That wasn't your business? A. No, sir.

Q. You didn't pay any attention to the kind of car you were going to couple? A. No, sir.

Q. You paid no attention as to what kind of a drawbar or deadwood the car had? A. No more than to see that they were there; to see that the pin and link was there.

Q. You saw that, did you? A. Yes, sir.

Q. Further than that you didn't pay any attention to it, you say? ⁴⁵⁸ A. No, sir; I didn't.

Q. You paid no attention to the kind of deadwoods, whether it was a foreign car or whether it was a St. Joseph or Chicago, Burlington & Quincy ear? A. I paid no attention to that at all.

As we have hereinbefore concluded, it was the duty of the

company to receive and transport these "foreign cars." They were not shown to be faulty, or out of repair, nor was it shown that the deadwoods with which they were equipped were unsuited to the purpose for which they were intended or made, nor that they were unreasonably unsafe or hazardous. From which we must conclude that it was not negligence in the company to receive them and haul them over its road. The question of whether it is an act of negligence for a railway company to receive and draw cars of another company, which have on them double buffers, while its own cars have or are equipped with a different pattern of deadwoods, has been considered in a number of cases, and almost without exception it has been held not to constitute negligence: *Pittsburg etc. R. Co. v. Henly*, 48 Ohio St. 608; *Michigan etc. R. R. Co. v. Smithson*, 45 Mich. 212; *Hathaway v. Michigan Cent. Ry. Co.*, 51 Mich. 253; 47 Am. Rep. 569; *Indianapolis etc. R. Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. Chicago etc. R. Co.*, 50 Iowa, 680; *Kohn v. McNulta*, 147 U. S. 238.

It is a well-settled rule that it is the duty of an employer to exercise due care for those in his employment, and not subject them to hazards or dangers by his negligence. It is also well established that one entering into the employment of another assumes the risks ordinarily incident to the employment, including such as are open, apparent, or obvious, or should be to a person of the experience and understanding of the employé. The difference in the danger in coupling cars having double buffers and those having single is one of degree, and the extra hazard requires a greater degree of care. We have been furnished, in the record, with a photograph, which is said to be a fair representation of the deadwoods on the ⁴⁵⁹ cars which the defendant in error tried to couple, and it is very apparent that if a person should approach a car, on which was such an appliance, to do work which required that he place an iron pin in a hole in the drawbar situated between the timbers of the deadwood, it would be almost an impossibility for him to do so without noticing the construction of the deadwood, unless he was at the time very careless and unobservant. Furthermore, defendant in error, with his six or seven years' experience as a railroad man, knew, or must be charged with notice, that cars similar to these were passing back and forth across the country, on any and all the lines of railroad, and that he might be called upon to work on or about one at any time, and must take the necessary care and thought to do so safely; and if it could not be done

by the exercise of due care, to refuse to do the task, for no one can or will be called upon to perform an impossible task, or one which cannot be safely performed, if proper care and attention be exercised.

In the opinion in the case of Michigan Cent. Ry. Co. v. Smithson, 45 Mich. 212, wherein the action was predicated on an injury to the hand of an employé of the company, which occurred while he was engaged in an attempt to couple a car which belonged to another company, then being hauled over the road, and which had double deadwoods, it was stated: "But we have had produced for our inspection on the argument a model of the double deadwoods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the difference from those belonging to the defendants, than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double deadwoods or to approach them for the purpose with any degree of attention without observing it. This is so whether the coupling is done in the daytime or night-time; for in the night every switchman has his lantern with him, or should have it on all occasions. If, therefore, ⁴⁶⁰ a switchman were to declare that he had attempted to couple the double deadwoods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. Moreover, the business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen. The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume as he passes from one to another that the two will be alike; much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the no-

tice than before; and a man who would not heed the information the very nature and course of the business would impart to him, would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it."

In *Hathaway v. Michigan Cent. Ry. Co.*, 51 Mich. 253, 47 Am. Rep. 569, another case in which the facts were similar to the circumstances in the case at bar, it was said: "In this case, the danger consisted in the brakeman being caught between the two deadwoods as they came together. The deadwoods were in plain sight; they were really the most prominent objects on the end of the cars. The plaintiff had full opportunity ⁴⁶¹ of examining the one by which he stood some moments before the cars came together. Its size, shape, and the location of the drawbar were before him. He had only to look at it to be informed of any peril surrounding it. The moving car at a distance of twenty feet, with its deadwood and drawbar in plain view, slowly approached the one where the plaintiff was standing. It does not appear there was any hurry about the business. How could the plaintiff have been better warned? Certainly he knew the car was coming, and could see the deadwoods and drawbar thereon as well as if he had made the coupling a thousand times before. He could not fail to see if he looked at all. It was no special risk to which he was subjected, but it was common to all that class of cars going daily over the defendant's road, and of which the plaintiff had had, for nearly a week, at least, the opportunity of knowing, whether he availed himself of it or not. The risk in making that coupling was incident to the service the plaintiff had voluntarily engaged in—one of which, from the very nature of the business, he must, under the circumstances, have been cognizant; and no other or better notice of which could be possibly given than that which the plaintiff had as he stood there and saw the two cars, with the deadwoods approaching each other; and no amount of experience could further or better warn the plaintiff of the dangers then before him in making the unfortunate coupling. . . . The plaintiff had full opportunity to see and examine the cars from which he received his injury, and all the peculiarities of the double deadwoods, if there were any, and the differences between them and the deadwoods upon the Michigan Central cars, had he looked at them; they were in the very train in which he was injured. He might have seen that the drawbars of the cars he was in-

jured by projected little, if any, beyond the faces of the deadwoods; that to place his arm between the approaching blocks would inevitably result in injury; and that the way to make the coupling safely was to keep his arm ⁴⁶² above or below the deadwoods. All these things were before him, and it was the simplest of all his duties to look at them. No youthful inexperience can be offered as an excuse for his failing so to do; and his failure to use his lantern and make such observations, under the undisputed facts and circumstances disclosed in this record, shows unmistakably a degree of negligence on the part of the plaintiff which very largely contributed, if not wholly, to the injury complained of."

In *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 187, we find the following: "The occasional or frequent use of such cars on any road, in the ordinary course of business, is one of the ordinary risks an employé assumes. He knows, or is bound to know, that cars from other roads are being constantly hauled over the road whose employé he is. The most ordinary observation will teach him this. He must know these cars may be differently constructed."

In the opinion of the case of *Kohn v. McNulta*, 147 U. S. 238, written by Mr. Justice Brewer, it was stated: "It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length, to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to anyone. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer: *Tuttle v. Detroit etc. Ry. Co.*, 122 U. S. 189; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; 20 Am. Rep. 331."

We must conclude that the company was not negligent in receiving and hauling these cars over its road, and that the risks incident to the coupling were assumed by the defendant in error.

⁴⁶³ There was some evidence in regard to a coupling knife and its use on some roads, but there was not evidence sufficient to sustain a finding that the knife was necessary for such coup-

lings as was the one attempted by defendant in error, or that a failure to furnish the knife was an act of negligence which rendered or tended to make plaintiff in error liable for the injury on which this suit is based. It is possible that facts might be shown which would lend force to the position taken in this branch of the case, but they are not in the record before us: *Hathaway v. Michigan Cent. Ry. Co.*, 51 Mich. 253; 47 Am. Rep. 569.

We will now turn our attention to the examination of the question herein presented, relative to the relief department in regard to the claim that the contract by which the party injured becomes entitled to benefits, if he chooses to take them, is invalid and incapable of enforcement. The question here raised was considered by this court in the case of *Chicago etc. R. R. Co. v. Bell*, 44 Neb. 44, and the contract held to be a valid one. We have been furnished with no reasons which seem sufficient to call for a reversal of the views then adopted and announced; hence, we will again approve them herein. See, also, on this point, *Shaver v. Pennsylvania R. Co.*, 71 Fed. Rep. 931; *Johnson v. Philadelphia etc. R. Co.*, 163 Pa. St. 127; *Owens v. Baltimore etc. R. Co.*, 35 Fed. Rep. 718; *Black v. Baltimore etc. R. Co.*, 36 Fed. Rep. 655; *Donald v. Chicago etc. Ry. Co.*, 93 Iowa, 284; *Leas v. Pennsylvania Ry. Co.*, 10 Ind. App. 47; *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529; 44 Am. St. Rep. 628; *Pittsburgh etc. R. Co. v. Cox* (Ohio, Dec. 15, 1896), 45 N. E. Rep. 641. As we have hereinbefore stated, it was pleaded in the reply that "plaintiff further alleges the fact to be that before he could engage in the services of said company he was required and compelled to join said Burlington Voluntary Relief Department and become a regular member thereof." In this it will be noticed there is no direct statement that whatever was done in coercing the defendant in error to join the relief department was by or ^{for} for the company, though it is true that it is the inference which must naturally be drawn from the statement that the requirement was by or for the company; but without regard as to whether this was sufficient, there was no evidence of any undue influence or pressure brought to bear by this company to induce the defendant in error to become a member of the relief department, and with such existent conditions and facts at the time the influence was exerted as must be in order to render the contract invalid or voidable.

There is another question which we will notice. The defendant in error having received benefits or payments under

the contract by which he became a member of the relief department, if it be conceded that it was a contract which he could avoid at any time by disaffirming, can he now successfully attack it; or, if he might now be allowed to repudiate it, must he first tender a return of what he has received under and by virtue of it? Such a contract may be either ratified or disaffirmed at the option of the aggrieved party: Clark on Contracts, 373. The defendant in error admitted in his reply that he had received benefits under the contract, and, so far as we are informed by the evidence introduced on this branch of the case, there were no facts which would tend to show that his actions in receiving the payments were without full knowledge and information of the effect of such acts on his part, or that they were done by other than his own free will and accord. What may be developed at another trial remains for the future. On the subject of the necessity of the tender of the return of the benefits received it has been said: "A release of a claim for damages for injuries received through negligence, obtained by fraud, is valid until disaffirmed by tendering back the consideration": Kreuzen v. Forty-second Street etc. Ry. Co. (City Ct. N. Y. 1891), 13 N. Y. Supp. 588.

The judgment of the district court must be reversed and the case remanded for further proceedings.

RAILROAD COMPANIES—CARS OF ANOTHER COMPANY—LIABILITY TO EMPLOYEES INJURED THEREBY.—A direction in a state constitution requiring all railway corporations to receive for transportation the cars of other corporations does not require the former to receive such cars in a dangerous condition, nor exonerate them from liability to their employes injured in the performance of their duties by reason of such cars being of a dangerous and faulty construction, rendering them unsafe to the persons required to handle them: Louisville etc. R. R. Co. v. Williams, 95 Ky. 199; 44 Am. St. Rep. 214, and note. A railroad using the cars of a connecting line is liable to the same extent as if they were its own, if such cars, when received and used, are in a condition dangerous to its employes: Reynolds v. Boston etc. R. R. Co., 64 Vt. 66; 33 Am. St. Rep. 908; Ruppel v. Allegheny Valley Ry. Co., 167 Pa. St. 166; 46 Am. St. Rep. 666. and note. It should not receive foreign cars when obvious defects exist which render them unfit for use: Gutridge v. Missouri Pac. Ry. Co., 94 Mo. 468; 4 Am. St. Rep. 392. A brakeman takes upon himself the manifest risk of coupling cars with double dead-woods: Hathaway v. Michigan Cent. R. R. Co., 51 Mich. 253; 47 Am. Rep. 569; and of coupling the car of another road to a caboose, where there is an apparent difference in the height of the couplings: Kelly v. Abbott, 63 Wis. 307; 53 Am. Rep. 202. and extended note.

RELEASE IN CONSIDERATION OF BENEFITS OF RELIEF ASSOCIATION—RESCISSION.—If a railway corporation organizes a relief department for the benefit of its employes, and those electing to participate in its benefits enter into a contract stipulating that

the acceptance of benefit from the relief fund for injury or death shall operate as a release of all claims for damages against the corporation arising from such injury or death, and that they will execute such further instruments as may be necessary to formally evidence such release, such contract is valid, and an acceptance of benefits by an employé after such injury suffered by him releases all claims of damages therefor: *Ringle v. Pennsylvania R. R. Co.*, 164 Pa. St. 529; 44 Am. St. Rep. 628, and note. Ordinarily, one cannot bring an action or have a settlement for injuries received without having offered to return the money received by him under a previously executed release: See monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 510.

BRADLEY v. MISSOURI PACIFIC RAILWAY COMPANY.

[51 NEBRASKA, 653.]

EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF ADMINISTRATOR—COLLATERAL ATTACK.—If a sufficient petition for administration is presented to the proper court, and the statutory notice given, its action in appointing an administrator is valid and binding, unless revoked or set aside on appeal, and cannot be collaterally attacked.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF ADMINISTRATOR—COLLATERAL ATTACK.—The record of the appointment of an administrator not disclosing want of jurisdiction in the court, the existence of jurisdictional facts must, in a collateral proceeding, be conclusively presumed.

J. C. Watson, W. Adams, and N. F. Heitman, for the appellant.

E. F. Warren, C. W. Seymour, J. W. Orr, and P. B. Waggener, for the respondent.

653 **IRVINE, C.** The plaintiff in error, as administrator of the estate of Charles L. Meyers, deceased, brought this action against the Missouri Pacific Railway Company to recover damages on account of the death of his intestate, alleged to have been caused by the negligence of the railway company. Among other defenses, the railway company pleaded that Meyers was not an inhabitant of the state, and that he left no estate to be administered therein, and 654 that the county court of Otoe county, from which Bradley held letters of administration, was without jurisdiction in the premises. At the close of the evidence the district court instructed the jury that the county court was without jurisdiction, and that Bradley therefore had no authority to maintain the action, and that the jury should, for this reason, return a verdict for the defendant. A verdict was so returned and the case dismissed.

The petition for the appointment of the administrator alleges

sufficient facts to confer jurisdiction on the county court of Otoe county, and, this being true, the appointment of the administrator is not subject to collateral attack. *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, was an action similar in character to this, and the jurisdiction of the court appointing the administrator was attacked. In the opinion Judge Cobb says: "And, again, I do not think that in any event her appointment as administratrix of the deceased could be attacked collaterally." *Estate of Moore v. Moore*, 33 Neb. 509, was an appeal from an order allowing a claim against the estate. One of the heirs had filed objections to the claim, one objection being that the administration was void for want of jurisdiction in the court. The objections to the jurisdiction were the same as in this case, to wit, that the decedent was not an inhabitant of the state at the time of his death, and left no estate to be administered therein. It was held that the appointment was not open to attack in this manner, Norval, J., saying: "The application for the appointment of an administrator must allege the necessary jurisdictional facts, for if a want of jurisdiction affirmatively appears from the face of the record, it is fatal to the proceedings, and the objection can be urged at any time. . . . The right of the plaintiff in error to question the authority of the county court to grant letters of administration on the hearing of his objection to the allowance of the claim filed against the estate depends upon whether the record of the county court on its face shows the lack of jurisdiction to make ⁶⁵⁵ the appointment. It cannot be doubted that where a sufficient petition for administration is presented to the proper county court, and the statutory notice is given, its action in appointing an administrator is valid and binding unless revoked or set aside on appeal." These decisions control the present case, and we think that they are in accord with the vast weight of authority elsewhere, as well as consonant with sound principle. The district court, therefore, erred in giving the instruction complained of.

Reversed and remanded.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF—COLLATERAL ATTACK.—The appointment of an administrator cannot be impeached collaterally: *Riser v. Snoddy*, 7 Ind. 442; 65 Am. Dec. 740; *Abbott v. Coburn*, 28 Vt. 663; 67 Am. Dec. 735. It is a judicial act and, if the court has jurisdiction, the grant, though irregular, is valid, and cannot be avoided collaterally by showing that the person to whom the grant was made was not competent to qualify: *Palmer v. Oakley*, 2 Doug. 433; 47 Am. Dec. 41; extended note to *Ex parte Maxwell*, 79 Am. Dec. 65, 68; but a grant of letters of administration on the estate of one who did not reside within the

jurisdiction of the court making the grant at the time of his death, is void and may be attacked collaterally: *People's Sav. Bank v. Wilcox*, 15 R. L. 258; 2 Am. St. Rep. 894.

GUTHMANN v. VALLERY.

[51 NEBRASKA, 824.]

LANDLORD AND TENANT—DEATH OF TENANT FOR LIFE—RIGHTS OF HIS LESSEE.—The death of a life tenant terminates the lease of the premises between him and his lessee, and the lessee may at once surrender the possession discharged of any liability to the reversioner for rent thereafter accruing.

LANDLORD AND TENANT.—THE LESSEE OF A TENANT FOR LIFE is bound to take notice of the extent of his landlord's title, and on the termination of the life estate he becomes a tenant at sufferance.

LANDLORD AND TENANT—LESSEE FROM TENANT FOR LIFE—LIABILITY FOR RENTS.—A lessee from a tenant for life, who remains in possession of the premises after the termination of the life estate without any contract with the reversioner or protest or objection from him, becomes liable to the latter for the reasonable value of the use and occupation of the premises, but not liable on his contract with the tenant for life.

LANDLORD AND TENANT—LESSEE FROM TENANT FOR LIFE—RIGHT OF REVERSIONER TO RENTS.—If the lessee of a tenant for life remains in possession after the termination of the life estate without any contract with the reversioner, and pays the full amount of rent reserved in the lease to the administrator of the tenant for life, the reversioner has no claim against the estate of the life tenant for the rent thus paid, and the administrator of such estate, though he has converted such money to his own use, or the use of another, is not liable to the reversioner therefor.

H. D. Travis, for the appellant.

M. Gering, for the respondent.

825 RAGAN, C. Charles Guthmann was seised in fee of certain real estate situate in Cass county. He devised the same by his will to his daughter, Minnie E. Guthmann, subject to a life estate therein in favor of his wife, Mary J. Guthmann, and died. His widow took possession of the real estate and leased it from March 1, 1893, to March 1, 1894, at an agreed rental of one hundred and fifty dollars, and for such rent accepted the tenant's note due March 1, 1894, and on the 27th of July, 1893, the tenant for life died. Jacob Vallery, Sr., was appointed administrator of the estate of the life tenant and after the rent note matured he collected the same. The tenant of the tenant for life remained in possession of the premises until the expiration of the lease executed between said parties. The record does not show that this tenant remained in possession after the death of the tenant for life with the consent of the owner of the reversion,

nor that the reversioner objected to the possession retained by such tenant. Minnie E. Guthmann, the owner of the reversion, sued Jacob Vallery, Sr., in the district court of Cass county, to recover the rent of the premises from the death of the life tenant until the expiration of the lease made by her as fixed by the lease between the tenant and the life tenant. The trial resulted in a judgment dismissing Miss Guthmann's action, and she brings that judgment here for review on error.

One cannot convey to another a greater interest in real estate than he is himself possessed of, and the lease of the real estate made by the widow terminated at her death. Upon the termination of the life estate the tenant in possession became a tenant at sufferance, and he might then ⁸²⁶ have abandoned possession of the premises, as he was under no obligation to occupy as the tenant of the reversioner; and probably, although we do not decide the point, had he abandoned the premises, he would have been discharged from any liability for rent even to the administrator of the life tenant: *Hoagland v. Crum*, 113 Ill. 365; 55 Am. Rep. 424; 2 Blackstone's Commentaries, sec. 124. On the termination of the life estate, the reversioner became at once entitled to the possession of the real estate; and it seems that the life tenant's tenant in possession would not have been entitled to a notice to quit the premises or demand for the possession thereof from the owner of the reversion in order to enable the latter to maintain an action for possession. This is because the tenant, at the time he entered possession under his lease from the life tenant, was charged with notice of the extent of his landlord's title. The tenant of the owner of the life estate, having remained in possession of the premises after the termination of that estate without protest or objection from the owner of the reversion, became liable to the reversioner for the reasonable value of the use and occupation of the premises at the time they were occupied after the termination of the life estate: *Hoagland v. Crum*, 113 Ill. 365; 55 Am. Rep. 424; *Wright v. Roberts*, 22 Wis. 165. Whether the tenant, after the termination of the life estate, was liable to the estate of the life tenant for rent of the premises we do not decide; but whether liable or not, the tenant recognized his promise as binding and paid the full rent reserved to the administrator of the life tenant. It is clear that the reversioner has no claim against the estate of the life tenant for this rent or any part of it. The contract between the life tenant and her lessee was not made for or on behalf of the reversioner, nor was she a party to this contract. The lessee

did not pay this money to the administrator of the estate of the life tenant for the use of the reversioner; and if the lessee has any claim against the estate of the life tenant by reason of having paid rent for a full term which failed, the reversioner ⁸²⁷ has not succeeded by assignment, or otherwise, to that claim, nor is she entitled to be subrogated to the rights of the lessee, if she have any, against the estate of the life tenant. The question then is, whether Vallery, because he collected from the lessee of the life estate the rents reserved by the lease after its termination, is liable to the reversioner for such rents. If Vallery is liable, it must be because he has appropriated to his own use, or the use of another, property which belongs to the reversioner without the latter's consent, or that he has exercised dominion over such property of the reversioner in exclusion and in defiance of his rights. But the rents which the lessee paid to Vallery were not the property of the reversioner. There was no contract existing between this lessee and the reversioner as to this rent; and if it be true that the lessee was not indebted to the estate of which Vallery was administrator, and that the lessee should have paid this rent money to the reversioner for the use and occupation of the premises instead of paying it to the estate of the tenant for life, still it does not follow that the reversioner is entitled to make Vallery account to her for it. When the life estate terminated the reversioner became entitled to the immediate possession of the estate; to collect rents from tenants who occupied it as such; to collect from the tenant at sufferance the value of the use of the premises so long as such tenant occupied it; but it by no means follows that, because the reversioner was possessed of these rights, therefore she was the owner of the moneys which the lessee saw fit to pay to the estate of the life tenant, or the administrator of that estate, in discharge of his contract made with the tenant for life. The judgment of the district court is affirmed.

LANDLORD AND TENANT—LESSEE OF LIFE TENANT—DEATH OF LIFE TENANT—RIGHTS OF REVERSIONER.—A tenant for life has the power of making underleases for a lesser term; and the under-tenant has the same rights and privileges during his tenancy as are incident to a tenant for life: *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362, and extended note, 369; *Wiggin v. Wiggin*, 43 N. H. 561; 80 Am. Dec. 192. Where a tenant for life leases the estate for a term of years at a yearly rent, and dies before one of the rent days, the rent cannot be apportioned, and the tenant may quit free of rent from the last rent day; but if he remains, and the reversioner acquiesces, the latter may recover for his use and occupation from the lessor's death: *Hoagland v. Crum*, 113 Ill. 365; 55 Am. Rep. 424.

CRAM v. SICKEL.

[51 NEBRASKA, 828.]

AGENCY—ATTORNEY HOLDING CLAIM FOR COLLECTION—AUTHORITY—NOTICE.—A debtor who deals with an attorney holding a claim against him for collection is bound to take notice of the attorney's authority.

AGENCY—AUTHORITY OF ATTORNEY FOR COLLECTION.—An attorney who holds a claim for collection has no authority to receive anything in payment of such claim except money, unless especially authorized to do so by his principal, nor to release one of two joint debtors in consideration of the other giving security for the debt.

AGENCY—REPUDIATION OF UNAUTHORIZED CONTRACT.—If a principal repudiates the unauthorized contract of his agent within a reasonable time after being informed thereof, and restores to the owner all fruits which have come into his hands as the result of such unauthorized contract, he cannot be held liable thereon.

AGENCY—ESTOPPEL AS TO UNAUTHORIZED ACTS.—In order to estop a principal because of his approval of an unauthorized act of his agent, it is not enough to show that he has in some manner approved of such act; but it must also appear that he approved it with knowledge of what the agent had done and promised in his principal's behalf.

J. S. Bishop, for the appellant.

D. L. Love, for the respondent.

828 RAGAN, C. George F. Cram sued Bernard Sickel and Luther P. Ludden, copartners, in the district court of Lancaster county to recover a balance on account for goods sold and delivered by Cram to Sickel and Ludden. The defendants below had a verdict and judgment, and Cram prosecutes here a petition in error.

To a proper understanding of the points presented in this case a short statement of the facts admitted and established by the finding of the jury becomes essential.

Prior to August, 1892, Sickel and Ludden dissolved their copartnership, the agreement of dissolution providing that Sickel should assume the liabilities and be entitled to the assets of the firm. Prior to August, 1892, Cram sent the account he held against Sickel and Ludden **829** to an attorney at law residing in Lincoln, Nebraska, for collection. Sickel was at that time indebted to the attorney, and the latter presented the claims of Cram to Sickel for payment, and the negotiation between them resulted in Sickel giving to the attorney a note of the firm of Sickel & Ludden, payable to the attorney's order for the full amount of the Cram claim and the amount which

Sickel owed the attorney, and secured this note by chattel mortgage upon the stock of goods formerly owned by Sickel & Ludden. Subsequently, the attorney seized the property conveyed by the chattel mortgage and sold it, paid the debt due to himself from Sickel, the cost of the foreclosure proceeding, and had on hand a few dollars to apply on Cram's debt.

As already stated, this suit is to recover the balance owing from Sickel & Ludden to Cram on his account. As a defense to the action, Ludden pleaded that Cram's attorney agreed with Sickel at the time the latter gave him the note and chattel mortgage that he, Ludden, should be released and discharged from all liability to Cram in consideration of Sickel's giving the attorney the note and mortgage which he did give him. Whether this agreement was actually made by the attorney was one of the issues litigated on the trial, and in justice to the attorney it must be said that he strenuously denied having ever made any such arrangement; but the jury found that he had, and we are constrained to say that there is sufficient evidence to sustain that finding, although the evidence is very unsatisfactory. Sickel defended the suit on the ground that at the time the attorney seized the property under the chattel mortgage he voluntarily surrendered the mortgaged property, under an agreement between him and Cram's attorney that by so doing the mortgaged property should be taken and accepted in full satisfaction of the note which it was pledged to secure. Whether this arrangement was made was another issue litigated on the trial, and the jury found that it was so entered into; and the evidence, we think, supports the ⁸³⁰ finding, although we frankly confess that had we been trying the issue we should have reached a different conclusion. Soon after the attorney took from Sickel the note and chattel mortgage, he notified Cram of what he had done, and Cram approved of it. The attorney also notified Cram that he had seized the property and foreclosed the chattel mortgage and realized from that sale some fifty or sixty dollars altogether, and the ten dollars or fifteen dollars of this sum that was coming to Cram was, by his consent, retained by the attorney. But Cram never had any knowledge or notice that his attorney had agreed to release Ludden, if such agreement was made, and never had any knowledge or notice that his attorney had agreed to take the mortgaged property in satisfaction of the debt, if such an arrangement was made. On the trial, the district court, at the request of the defendants in error, instructed the jury as follows: "The jury are instructed that where a contract made

by an agent for his principal is accepted and ratified by the principal, the principal is charged with all of the instrumentalities used by the agent in obtaining the contract; and in this case, if J. S. Bishop, as agent or attorney, procured a chattel mortgage for plaintiff's benefit from the defendant Sickel upon the agreement that defendant Ludden should be released and that the chattel mortgage was accepted and enforced by plaintiff, then defendant Ludden is released as per such agreement, whether defendant Bishop had authority to make it or not." The court refused to give an instruction asked by Cram, to the effect that an attorney who held a claim for collection had no authority to receive anything in payment of such claim except money, unless specially authorized so to do by his principal. We think the court erred in refusing to give the instruction requested, and erred in giving the instruction which it did. Bishop was the agent of Cram for collecting the debt owing to him by Sickel & Ludden. They dealt with Bishop knowing that he was an agent, and they were bound to take notice of the extent of his authority, and, ⁸³¹ in the absence of express authority from his principal, Bishop was not invested with authority to accept in payment of his principal's debt the stock of goods: *Mathews v. Hamilton*, 23 Ill. 470.

The authority of an agent to collect the debt of his principal does not invest such agent with authority to take the property other than money of the debtor in payment of such a claim: *Taylor v. Robinson*, 14 Cal. 396.

Without special authority an agent can only receive payment of the debt due his principal in money in the legal currency of the country: *Ward v. Smith*, 7 Wall. 447; *McCormick v. Wood*, etc. *Machine Co.*, 72 Ind. 518; *Graydon v. Patterson*, 13 Iowa, 256; 81 Am. Dec. 432; *Fellows v. Northrup*, 39 N. Y. 117.

In *Nolan v. Jackson*, 16 Ill. 272, it was held that an attorney employed to collect a debt had no authority to compromise the debt on payment of a part thereof, nor to accept in satisfaction of such debt anything but money: *Lewis v. Gamage*, 1 Pick. 346.

In *De Mets v. Dagron*, 53 N. Y. 635, an attorney was authorized to collect the debt of his principal and execute a discharge of such debt. Instead of collecting the debt in money, he took a promissory note of the debtor payable to his principal's order in payment of a judgment in favor of his principal and against the debtor, and released such judgment, and the court held that

the attorney exceeded his authority, and the discharge of the judgment did not bind his principal.

In *Miller v. Edmonston*, 8 Blackf. 290, an attorney held three notes for collection belonging to his client signed by A and B. The attorney had no special instructions. He took a note from B for the amount of the three notes of A and B and surrendered the three notes to B, and then, at his request, B confessed a judgment in favor of the attorney's client on the note given by him; and the court held that the attorney had exceeded his authority and that his conduct was not binding upon his client. The court said: "When a demand is ⁸⁸² placed in the hands of an attorney at law for collection without any special instructions, the authority conferred upon, and the duty assumed by, him is to use due diligence to collect the debt by suit or otherwise. He has no authority to compromise with the debtor, and cannot bind his principal by any arrangement short of an actual collection of the money": *Hamrick v. Combs*, 14 Neb. 381; *Smith v. Jones*, 47 Neb. 108; 53 Am. St. Rep. 519; *Moore v. Pollock*, 50 Neb. 900.

From these authorities it is clear that if Bishop agreed that Ludden should be discharged from his debt to Cram in consideration of the note and mortgage executed by Sickel to Bishop, the latter exceeded his authority and the agreement did not bind Cram; and if Bishop agreed with Sickel to take the stock of goods in satisfaction of the debt due Cram, in so doing he exceeded his authority and the agreement was not binding upon Cram. But in the instruction first quoted above the court told the jury, in effect, that if Cram accepted and enforced the chattel mortgage given by Sickel to Bishop, this was a ratification of Bishop's acts, although they were unauthorized. In view of the evidence, this instruction should not have been given. In order that Cram should be held to a ratification of the unauthorized acts of Bishop in releasing Ludden and accepting the stock of goods in discharge of the debt he must have known, at the time that he approved of Bishop's taking the mortgage and foreclosing it, the terms and conditions upon which Bishop acted. In other words, to estop Cram by ratification in approving of Bishop's taking the mortgage and goods, Cram must have acted with a full knowledge of all the material facts upon which the transaction rested.

The undisputed evidence shows that if such agreements as were pleaded by Ludden and Sickel were ever made, they were not only made without authority of Cram, but made without his

knowledge; and when he approved of Bishop's conduct in taking the mortgage on the goods and in selling the goods, he did so without ⁸³³ the slightest intimation of the agreements now pleaded by Sickel and Ludden. The instruction estops Cram by ratification simply because he approved of the taking of the mortgage and the goods, omitting entirely the knowledge upon which Cram acted. It is true that the retention by the principal of the fruits of an unauthorized act of his agent is a ratification of such agent's act: *Johnston v. Milwaukee etc. Investment Co.*, 49 Neb. 68. But it is also true that knowledge by the principal of the material facts is an essential element of an effective ratification by him of the unauthorized act of his agent: *O'Shea v. Rice*, 49 Neb. 893. It is also true that a principal must repudiate the unauthorized act of his agent within a reasonable time after such act comes to his knowledge or he will be held bound thereby, and that a principal cannot retain the fruits of the unauthorized act of his agent and at the same time repudiate such act. In this case, Cram has repudiated the unauthorized agreements which it is alleged were made in his behalf by his agent, surrendered in court the note taken by Bishop for his (Cram's) debt, and sued on the open account existing between him and Sickel and Ludden, after crediting it with the proceeds derived from the sale of the mortgaged property. Cram, then, has not only repudiated the unauthorized contract of his agent, but he has done it within a reasonable time after being informed of such act, and he has restored to Ludden and Sickel all the fruits which came into his hands as the result of the unauthorized agreements made with them by Bishop. In other words, where it is sought to estop a principal because of his approval of an unauthorized act of his agent, it is not enough to show that he has in some manner approved of such act, but it must also appear that he approved it with knowledge of what the agent had done and promised in his principal's behalf.

Counsel for the defendant in error, in support of their contention that the approval by Cram of Bishop's conduct in taking the mortgage and in foreclosing it was of ⁸³⁴ itself a ratification of all Bishop's acts, cite us to *Hartley State Bank v. McCorkell*, 91 Iowa, 660. In that case, an agent surrendered certain chattel security held by the principal to secure the payment of the debt in consideration of the debtor's giving the principal real estate security, and the court held that the principal, by foreclosing the real estate mortgage, had ratified the unauthorized act of his agent; but the court puts its decision upon the

ground that the evidence showed that the agent had authority from his principal to change the securities. The case is not an authority in point here.

We conclude, therefore, that Bishop, in agreeing to release Ludden and accept the stock of goods in payment of the debt due Cram from Sickel and Ludden, exceeded his authority, and his principal is not bound by such agreement; that the finding of the jury that Cram had ratified the unauthorized acts of Bishop is wholly unsupported by the evidence.

The judgment of the district court is reversed and the cause remanded.

AGENCY.—PERSONS DEALING WITH AN AUTHORIZED AGENT are bound to inquire and ascertain the extent of his authority: *Busch v. Wilcox*, 82 Mich. 836; 21 Am. St. Rep. 563, and note; *Farrington v. South Boston R. R. Co.*, 150 Mass. 406; 15 Am. St. Rep. 222.

AGENCY—POWER OF COLLECTING AGENT.—The authority of an agent to collect money for his principal does not authorize him to receive anything but money in payment: Extended note to *Kane v. Barstow*, 16 Am. St. Rep. 493; extended note to *Martin v. United States*, 15 Am. Dec. 130.

AGENCY—UNAUTHORIZED ACTS OF AGENTS—RATIFICATION BY PRINCIPAL.—A ratification must be with full knowledge of the agent's acts: *Blerman v. City Mills Co.*, 151 N. Y. 482; 56 Am. St. Rep. 635. Accepting and retaining the benefits of unauthorized contracts of an agent, with full knowledge of all circumstances, constitutes ratification: *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; but in the absence of full knowledge, does not: *Bryant v. Moore*, 28 Me. 84; 45 Am. Dec. 96. See extended note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 109-114.

STATE v. MIDLAND STATE BANK.

[52 NEBRASKA, 1.]

BANKS—DEPOSIT OF SCHOOL MONEY—INSOLVENCY—TRUST FUND—PREFERRED CLAIM.—If the treasurer of a school district deposits money in a bank, which is at all times advised of the fact that the money so deposited belongs to the school district, a trust results in favor of the beneficial owner, and, upon the insolvency of the bank, its estate is chargeable with the full amount of the deposit, to the prejudice of nonpreferred creditors.

DEBTOR AND CREDITOR—BANK AND SCHOOL DISTRICT—DEPOSIT OF SCHOOL FUNDS.—A general deposit of school district funds, held by the treasurer of a school district, does not create the relation of debtor and creditor between such district and the bank in which such funds are deposited, as the treasurer has no power to create such relation.

The appellants, in this case, were the Midland State Bank and Joseph W. Thomas, receiver.

John L. Kennedy, for the appellants.

Byron G. Burbank and McCoy & Olmsted, for the appellee.

² POST, C. J. This is an appeal by the receiver from an order of the district court for Douglas county preferring the claim of appellee, school district No. 5 of said county, against the Midland State Bank, recently impounded on motion of the state banking board. The facts essential to an understanding of the controversy are as follows: On the twelfth day of February, 1896, John Bondesson, as treasurer of the appellee district, deposited in the bank above named the sum of thirteen hundred and eight dollars and eight cents, money of said district, and held by him as such, and that he subsequently made other deposits of funds intrusted to him as such treasurer amounting to two thousand two hundred and forty-one dollars and eighty-three cents. He also checked against his said account from time to time in payment of orders or warrants drawn by the district board, so that there was to his credit in said bank when it passed into the hands of the receiver the sum of fourteen hundred and sixty-three dollars and eighty-six cents. The original credit was given to Bondesson as treasurer, and the pass-book, in which the several credits were entered by the cashier, shows an account between the bank and the school district. The inference is therefore irresistible that the bank was at all times advised of the fact that the money deposited belonged not to Bondesson, but to appellee.

The powers and duties of school district treasurers are defined

by section 5, subdivision 4, of chapter 79 of the Compiled Statutes, entitled "Schools," in the following language: "It shall be the duty of the treasurer of each district to apply for and receive from the county treasurer all school moneys apportioned to the district, or collected for the same by said county treasurer, upon order of the director, countersigned by the moderator of each district, all moneys received by him." And in section 9 of subdivision 11 appears the following inhibition upon the powers³ of the treasurer: "School district treasurers are forbidden to lend or use any part of the school moneys which may be in their hands under penalty of fine and imprisonment under the provisions of the statute regarding embezzlement." No question is here raised of the right of a school district treasurer, or other officer charged with custody of public funds, to deposit the same in bank for safe keeping, provided he so far retains the control over them that they may be by him reclaimed at any time. It is, however, contended that the treasurer was, in this instance, without authority to make a general deposit of the funds in his hands, in the sense that the relation of debtor and creditor would result therefrom as between the school district and the bank, and to that proposition attention will now be directed. It has been many times held that when, except as specially authorized by statute, a treasurer, or other custodian of public money, makes a general deposit thereof in his own name, a trust results in favor of the beneficial owner, and that upon the insolvency of the bank receiving such funds with notice of their character, its estate is chargeable with the full amount of the deposit to the prejudice of nonpreferred creditors: See *Independent Dist. of Boyer v. King*, 80 Iowa, 497; *Bunton v. King*, 80 Iowa, 506; *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263. The principle underlying the cases above cited has been often recognized in this state in the distribution of the assets of insolvent banks: See *Anheuser-Busch Brewing Assn. v. Morris*, 36 Neb. 31; *Griffith v. Chase*, 36 Neb. 328; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786; 59 Am. St. Rep. 572. True, the two classes of cases differ in one respect, viz., in the former the inhibition results from the statute and the policy of the law applicable to custodians of public money, while in the latter the circumstances attending the deposit are such as to amount to a fraud against the owner of the fund, although the wrong in each consists in a violation of a trust relation with respect to the subject of the controversy. We are, in support of the opposing view, referred⁴ by counsel to the case *Allibone*

v. Ames, 9 S. Dak. 74, and also State v. Hill, 47 Neb. 456. Those cases are not, however, in our judgment, authority for the proposition asserted. The point there decided is, that the word "loan," as employed in the statutory inhibition upon the powers of the officers concerned, is used in its restricted sense, and includes those transactions only in which the conventional relation of borrower and lender exists—in brief, that a public officer, by depositing in bank money intrusted to his care in order to preserve the same, is not ipso facto guilty of conversion. In neither case was the question presented of the power of a treasurer, by a deposit of money in his hands as such, to create the relation of debtor and creditor between the bank and the public body whose commission he holds.

The judgment of the district court is right and will be affirmed.

BANKS—DEPOSIT OF TRUST FUNDS—INSOLVENCY—PREFERRED CLAIM.—If a trustee places a trust fund in a bank, and the bank, knowing its character, mingles it with its own funds, and, after using it in the payment of its debts, becomes insolvent, and assigns for the benefit of creditors, the beneficiary has a right to recover the trust fund from the assets of the bank in preference to its general creditors, although he fails to present his claim to the assignee for allowance: Myers v. Board of Education, 51 Kan. 87; 37 Am. St. Rep. 263. See, also, Duckett v. National Mechanics' Bank, 86 Md. 400; 63 Am. St. Rep. 513.

BANK DEPOSIT—TRUST FUNDS—LIABILITY OF BANK.—Pederson v. South Omaha Nat. Bank. 52 Neb. 95, was an action in equity to hold the bank answerable for the proceeds of the sale of a certain carload of cattle. The cattle were shipped by Pederson and sold by a live-stock commission firm, which deposited the proceeds in its own name, and with Pederson's knowledge, in the defendant bank. On the second day after such deposit, the firm ceased to do business, and was, at that time, insolvent, and, as such proceeds were lost through the firm's insolvency, the question presented was, whether the loss should be born by Pederson or by the bank. Pederson's theory was, that the firm was insolvent on the day that the cattle were sold and the deposit made; that the firm on that day was indebted to the bank; that the circumstances attending the deposit showed that the amount of such deposit had been derived from the sale of cattle made by the firm as agent, and that the deposit was not the property of the firm; and that, therefore, the deposit was impressed with a trust character. There was but one deposit made, and that was of the sum of one thousand thirty-four dollars and ninety cents. The original deposit slip accompanying this deposit showed that the sum was made up of four items, respectively of nine hundred and fifty-two dollars and forty-two cents, thirty dollars and forty cents, twenty-six dollars and thirty-two cents, and twenty-five dollars and seventy-six cents. Of these, the first was the amount of the proceeds of the sale of the cattle, but there was no indication upon this deposit slip whence any of the items therein described had been derived; and there was no other evidence that the bank knew or had any reason to suppose that Pederson was interested in the deposit. Hence, in view of the fact that the bank had no special knowledge of the nature of the

deposit which included the proceeds of the sale of the cattle, the court held that the bank should not be made answerable, as a trustee, for the amount of such proceeds, although it had, in the ordinary course of business, paid out a part thereof, on the checks of the firm, and had applied the remainder, the proceeds of the collection of a collateral, on indebtedness of the firm to the bank, for the security of which indebtedness such collateral had been transferred to the bank before the cattle were sold.

BOSLOW v. SHENBERGER.

[52 NEBRASKA, 164.]

EXECUTION—LEVY OF, WITHOUT JUDGMENT, IS VOID.—If an execution issues without a judgment, the writ is without authority of law and its levy gives no right of possession.

EXECUTION—VALID LEVY ON CHATTELS—WHAT IS.—A levy under execution is valid if, for the time being, the property is under the control of the officer, and he openly, and in express terms, asserts his dominion over it.

EXECUTION—VALID LEVY ON CHATTELS—ILLUSTRATION.—A levy of execution upon a team of horses is valid, if they are found in a stable, and the officer notifies the person in charge of the team that he levies thereon as the property of the defendant, and thereupon indorses the levy upon the execution, although he arranges with such person to keep the team, temporarily, and to allow no one to remove it.

APPEAL—WAIVER OF JURY—PRESUMPTION.—If the record shows that a jury was waived at a preceding term, such waiver will be presumed to have been general and not confined to the term at which it was made.

Hainer & Smith, for the plaintiff in error.

Kellogg & Graybill, for the defendant in error.

165 POST, C. J. This action of replevin originated before a justice of the peace for Hamilton county, where the defendant in error as plaintiff alleged as his cause of action the levy by him, as sheriff for said county, upon the property in controversy, to-wit, a team of horses, to satisfy an execution against Joseph Gion, and the subsequent wrongful and unlawful seizure of said property by the plaintiff in error, as constable, under and by virtue of an execution against said Gion. There was, on appeal to the district court, a judgment for the plaintiff, from which the defendant prosecutes error.

Both writs were regular in form, although that held by the plaintiff in error was issued without authority of law, there being no judgment against Gion in favor of the plaintiff named therein, the Kalamazoo Wagon Company. Such a writ, being fair upon its face, may, it is conceded, be sufficient to protect an

officer against personal liability for acts done in the execution thereof, although it cannot be made the foundation of any right in the property taken thereunder: Freeman on Executions, sec. 20, and cases cited. It follows that plaintiff in error's levy was void and invested him with no right of possession as against the defendant in error, and that the latter should recover, provided his levy was regular and sufficient in form, a question to which attention will now be directed. The return of the last-named officer shows a levy in due form at the hour of 4 o'clock P. M. of June 20, 1889, and is presumptively correct: Freeman on Executions, sec. 366. In addition thereto, he testified that he found the team in controversy on the day named at Engel's livery stable, in the village of Hampton; that said property was pointed out to him by Mr. Thayer, then in charge of the stable; that he immediately notified him, Thayer, that he had levied upon said team as the property of Gion, and thereupon ¹⁶⁸ indorsed said levy upon the execution. He testified, also, that he arranged with Thayer to keep the team and allow no one to remove it while he was engaged in the transaction of some other business preparatory to his return to the county seat, but that upon his return shortly thereafter to the stable he found the plaintiff in error standing between the horses, claiming possession by virtue of a levy under the execution above mentioned, and refusing to surrender said team upon demand. Was there, in view of the facts stated, a levy by defendant in error which clothed him with a special ownership of the property in controversy? That question must, we think, be resolved in the affirmative. It has uniformly been held sufficient to constitute a valid levy if the property is for the time being under the control of the officer, and if he openly and in express terms asserts his dominion over it by virtue of the writ: *Barker v. Binniger*, 14 N. Y. 270; *Roth v. Wells*, 29 N. Y. 471; *Bond v. Willet*, 31 N. Y. 102; *Lloyd v. Wykoff*, 11 N. J. L. 218; *Johnson v. Walker*, 23 Neb. 736; 7 Am. & Eng. Ency. of Law, 149, and cases cited in note. That the property was, in this instance, within the control of the officer cannot, upon the facts, be doubted, and his act in intrusting it to the custody of Thayer with direction to allow no one to remove it was a sufficient assertion of his title under the writ.

Plaintiff in error, on the trial, relied also upon a subsequent levy by virtue of an order of attachment against Gion. It follows, however, from the conclusion reached respecting the sufficiency of defendant in error's levy, that there exists no founda-

tion for that contention and it may accordingly be dismissed without further comment.

It is alleged that the district court erred in denying plaintiff in error a trial by jury upon demand by him. We observe from the transcript that the cause came on for trial on the twenty-ninth day of March, 1894, that being one of the days of the regular March term, whereupon the defendant demanded a jury, but that a jury having been ¹⁸⁷ waived by both parties at a previous term, said demand was denied, to which the defendant excepted. A jury may be waived by agreement of parties in open court: *Gregory v. Lincoln*, 13 Neb. 352; and in the absence of a more complete record, we must presume that the waiver in this case was general, and not confined to the term at which it was made.

There is no error in the record and the judgment is affirmed.

EXECUTION MUST BE WARRANTED BY JUDGMENT: *Blanks v. Rector*, 24 Ark. 496; 88 Am. Dec. 780. It cannot be based on a void judgment: *White v. Foote Lumber etc. Co.*, 29 W. Va. 385; 6 Am. St. Rep. 650; *Olson v. Nunally*, 47 Kan. 391; 27 Am. St. Rep. 296.

EXECUTION—LEVY ON CHATTELS—WHAT SUFFICIENT.—As against all persons, except junior execution creditors, a levy upon personal property is good and valid, where the officer goes to the property so as to have it in his power to take it into actual possession, if he chooses, and indorses the levy on his process: *Sawyer v. Bray*, 102 N. C. 79; 11 Am. St. Rep. 713, and note. Compare *Jones v. Howard*, 99 Ga. 451; 59 Am. St. Rep. 231, and note. But as against junior execution creditors, the lien of the levy is lost, unless the officer takes the property, and retains actual possession thereof, either in person, or by his agent, until a sale: *Sawyer v. Bray*, 102 N. C. 79; 11 Am. St. Rep. 713. Compare *Jones v. Howard*, 99 Ga. 451; 59 Am. St. Rep. 231, and note.

PARDUE v. MISSOURI PACIFIC RAILWAY COMPANY.

[52 NEBRASKA, 201.]

MECHANIC'S LIEN—BUILDING CONTRACT—LIEN FOR DAMAGES.—A statute which confers a lien for labor performed or materials furnished for the erection of structures does not confer a lien thereon for damages caused by a breach of contract to erect them.

MECHANIC'S LIEN—BUILDING CONTRACT—LIEN FOR DAMAGES.—If a person contracts to construct an elevator, but is wrongfully interrupted by the owner before the work is completed, and is thereby prevented from completing it, the contractor is entitled to a lien for the value of all labor which he has performed and materials which he has furnished, but is not entitled to a lien for the damages occasioned by the breach of the contract.

MECHANIC'S LIEN—THE STATUTE OF LIMITATIONS begins to run against a mechanic's lien from the time that such lien is filed.

F. I. Foss and W. R. Matson, for the appellant.

Milton M. Starr and Lamb, Adams & Scott, for the appellee.

²⁰¹ **IRVINE, C.** This was an action by Pardue to foreclose a mechanic's lien on an elevator situated on the right of way of the Missouri Pacific Railway Company. The elevator belonged to the defendant McKee. The district court rendered a decree finding due the plaintiff four hundred and fifty dollars, and establishing ²⁰² a lien on the elevator, and such interest as McKee had in the land. McKee appeals.

It appears from the record that a contract was entered into between Pardue and McKee, whereby Pardue undertook to construct the elevator for seventeen hundred and twenty-five dollars. He performed certain work and furnished certain material, alleged to be of the value of six hundred and ninety-nine dollars and thirty-eight cents, when McKee took possession and himself completed the work, claiming the right to do so because of unreasonable delay by Pardue. The petition, after pleading the performance of labor and furnishing material as above stated, and admitting the payment of six hundred dollars, alleges that McKee's refusal to permit Pardue to proceed under his contract was wrongful, and that plaintiff was damaged thereby in the sum of eleven hundred and twenty-five dollars. The answer alleges that Pardue failed to complete the work within a stipulated time, or within a reasonable time, and counterclaims for several items of damages. It is somewhat difficult, from the briefs, to ascertain precisely what rulings McKee considers erroneous. The controversy turns almost entirely upon the question as to whether the exclusion of the contractor was rightful or wrongful, and as to what items of damages and counterdamages should be allowed. We do not see how, in this case, any of these questions can be considered. Our mechanic's lien law (Comp. Stats., art. 1, c. 54), confers a lien for labor performed or material furnished for the erection, reparation, or removal of certain structures; but it nowhere confers a lien upon such structures for damages arising from a breach of contract to erect them. Assuming, as plaintiff contended, and as the court below evidently found, that the owner's interruption of the contractor and refusal to permit him to proceed were wrongful, it is established that the contractor is entitled to a lien for the value of all labor which he has performed and material which he has furnished: *Von Dorn v. Mengedoht*, 41 Neb. 525. It is true that there is a statement

in that opinion that had there been a finding, supported by evidence that the contractors had sustained other damages ²⁰³ they would have been entitled to the amount of such damages. But there was no such finding and the lien was in that case allowed only for the value of the labor and materials. So the court was not considering whether the damages referred to, had they existed, would form the basis of a mechanic's lien. On the other hand, it is at once apparent that the statute does not confer a lien for such damages: *Denniston v. McAllister*, 4 E. D. Smith, 729. In deciding this point we are, perhaps, transgressing the general rule that the court will not consider questions not presented by the briefs. But the question is so fundamental that we feel warranted if not compelled to consider it. It would seem absurd, and certainly very difficult, to proceed in an attempt to adjust conflicting claims for damages for a breach of a building contract, with a view to establishing a lien therefor, when no such lien can possibly exist. The six hundred dollars was applied, both by contract and act of the parties, to payment for labor and materials, so that the only portion of that claim remaining unpaid is ninety-nine dollars and thirty-eight cents. There is ample evidence to support the finding of the district court in favor of the plaintiff as to this item.

It is argued that, as to the material, the law required the claim of lien to be filed within sixty days, and this was not done. Counsel, however, mistake the statute. The differing requirements as to the time when a claim of lien must be filed grow out of the distinction between principal contractor and subcontractors, and not between materialmen and builders. It is also argued that the lien takes effect from the time when the first materials were furnished, and we understand the position of counsel to be that the action must be brought within two years from that time. The statutory provision, however, is that the lien shall operate "for two years after the filing of such lien." The statute of limitations begins to run from that time, and not from the time when the lien first attaches. The action was brought within the prescribed period.

²⁰⁴ The decree of the district court is reversed, and a decree will be entered here in all respects similar, except that the amount of the lien will be only ninety-nine dollars and thirty-eight cents, with seven per cent interest from the eighth day of January, 1889, the date when McKee excluded the plaintiff from the work.

Judgment accordingly.

MECHANIC'S LIEN—ABANDONMENT OF, OR STOPPING WORK.—Parties are not absolutely barred of all rights to the lien law where the work is permanently stopped or abandoned without fault of such parties. In such cases, the building is to be deemed completed, so far as their right to assert liens is concerned, particularly if the abandonment was caused either by the consent or fault of the owner: See monographic note to *Goodman v. Baerlocher*, 43 Am. St. Rep. 900, on the right to a mechanic's lien when, without fault of the owner, the building is not completed.

STATE v. TIBBETS.

[52 NEBRASKA, 228.]

STATUTES—PASSING UPON CONSTITUTIONALITY.—Courts will not declare a statute unconstitutional unless it is clearly so.

STATUTES—CONSTITUTIONAL PROVISIONS AS TO TITLES.—A constitutional provision that no bill shall contain more than one subject, which shall be expressed in its title, is mandatory, but it is not to be exactly enforced, or in such a manner as to hamper or cripple legislation.

STATUTES — TITLES — WHEN SUFFICIENT — GENERALITY.—The title of a bill may be general, and need not specify every clause in the proposed statute. It is sufficient if each part is referable and cognate to the subject expressed; and, if the subject matter is within the scope of the title, the title is good.

STATUTES—TITLES—MUST INCLUDE SUBJECT MATTER.—An act is unconstitutional and void if its title is not broad enough to include the subject matter of the legislation.

STATUTES — TITLES — COMPREHENSIVENESS — PLURALITY OF SUBJECTS.—A constitutional provision that no bill shall contain more than one subject does not prohibit comprehensive titles, but does prohibit a plurality of subjects.

STATUTES—TITLES MUST EXPRESS SUBJECT OF LITIGATION.—The title of an act, whether of original legislation, or amendatory thereof, must fairly express the subject of legislation.

STATUTES—AMENDMENTS—TITLES.—Under the title of a bill to amend an existing act, or a section thereof, no amendment is permissible which is not germane to the subject of the original legislation.

STATUTES—AMENDMENTS—REQUIREMENTS AS TO.—An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections.

STATUTES — AMENDMENTS — MUST BE GERMANE—LIMITED TITLES.—Under a title which purports to amend certain designated sections of a prior act, the amendment of any section must be germane to the particular original section proposed to be changed. If not, the amendatory section is void, for such a title is limited and restrictive, and courts have no power to enlarge its scope.

STATUTES — AMENDMENTS CONTAINING FOREIGN MATTER—INVALIDITY OF.—An act which purports to amend a certain section of a prior act is unconstitutional and void where it contains subject matter not expressed in its title, and wholly foreign to the legislation embraced in the original section, as where the general object of the original section is the licensing of liquors, and

the subject matter of the amendatory section concerns the creation of a board of fire and police commissioners.

Hiland H. Wheeler, Burr & Burr, and M. B. Reese, for the relators.

Tibbets Brothers, Morey & Ferris, and Morning & Berge, for the respondents.

²²⁹ NORVAL, J. This was an original action of quo warranto brought by the state, on the relation of Frank A. Graham, Richard S. Grimes, and Harry B. Vaill, against Addison S. Tibbets, John H. McClay, and Fred A. Miller, to test the right of the respondents to discharge the duties of the office of the excise board of the city of Lincoln. The information alleges, in effect, that the relator Graham is now, and for more than two years last past has been, the duly elected, qualified, and acting mayor of said city, and by virtue of his office is a member, and chairman, of the excise board of the city of Lincoln; that the relators Grimes and Vaill are the other members of such board, each having been elected in April, 1895, for the term of two years, and until the election and qualification of his successor in office, and duly qualified and entered upon the discharge of the duties and functions of such office, and no successors ever have been elected and qualified; and that the respondents, since the nineteenth day of April, 1897, have usurped, used, and exercised the office of the excise board of the city of Lincoln, and excluded relators therefrom. The answer of the respondents substantially admits the averments contained in the information, and alleges, in effect, that the respondents, on the twenty-third day of March, 1897, were appointed and commissioned by Governor Holcomb as members of the board of fire and police commissioners in and for the city of Lincoln; that each respondent accepted such appointment and duly qualified as such commissioner, and that since the act of the legislature of 1897 went into force relators had no right or authority to perform the duties of members of the excise ²³⁰ board of the city of Lincoln. To the answer relators demurred, and the cause has been submitted for determination.

The state legislature of 1889 passed a law, which received executive approval, entitled "An act to incorporate cities of the first class, and regulating their duties, powers, government, and remedies": Laws, 1889, c. 14. The provisions of this act, with the subsequent acts amendatory thereto, govern cities of the class to which the city of Lincoln belongs. Section 13 of said

act was amended in 1891: Laws, 1891, c. 8; Comp. Stats., 1895, art. 1, c. 13 a. As thus amended, it provided: "A mayor, treasurer, clerk, water commissioner, city attorney, city engineer, and police judge shall be elected by a plurality of votes for the term of two years, and biennially thereafter. . . . There shall also be in each city governed by this act an excise board, consisting of the mayor, who shall be ex officio member and chairman thereof, and two members elected by the city at large, who shall hold their offices for two years. The terms of all elective officers shall commence on the Tuesday next after their election, and continue until their successors are elected and qualified," et cetera. It is under and by virtue of the foregoing piece of legislation that relators claim the right to discharge the duties and functions of the excise and police board of the city of Lincoln.

The respondents were appointed by the governor as members of the board of fire and police commissioners of said city, under the provisions of section 31 of the act of the legislature of 1897 known as Senate File 176 (Session Laws, 1897, c. 14, p. 139), entitled "A bill for an act to amend sections three (3), eight (8), nine (9), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-six (26), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-three (33), thirty-seven (37), thirty-eight (38), fifty (50), sixty-four (64), sixty-five (65), sixty-seven (67), sixty-nine (69), seventy (70), ²³¹ seventy-one (71), seventy-eight (78), eighty (80), eighty-three (83), ninety-one (91), and one hundred and fifteen (115), chapter 13 a of article 1 of the Compiled Statutes of 1895, for the government of cities of the first class having more than twenty-five thousand and less than one hundred thousand inhabitants, and to repeal section ten (10) and repeal said original sections and all amendments thereto, and all acts and parts of acts inconsistent with this act." Section 31 of the act reads thus:

Sec. 31. That section 31 shall be amended to read as follows: Sec. 91. In a city of the first class, there shall be a board of fire and police commissioners, who shall consist of three residents and electors of such city, who shall be appointed by the governor of the state. The governor shall, within thirty days from and after the passage of this act, appoint as the commissioners above named three citizens, not more than two of whom shall be from one political party; one of them shall be designated in said appointment to serve until May 1, 1898, the second to serve until May 1, 1899, and the third to serve until

May 1, 1900. And thereafter, at the expiration of said several terms, the governor shall appoint one member of said board for the term of three years. For official misconduct the governor may remove any of said commissioners; any person aggrieved by any act of said commissioners may file written charges against such commissioner or commissioners with the governor, who shall, within a reasonable time, investigate the same upon testimony produced before him, and shall make a finding as to the truth or falsity of such charges, and any and all vacancies of said board, by reason of death, resignation, or removal, shall be filled by said governor for the unexpired term, and all vacancies, from whatever cause, shall be so filled that not more than two of said board shall be of the same political party": Sess. Laws, 1897, c. 14, p. 175. The remainder of the section is too lengthy to reproduce here. For present purposes it is sufficient to state that it provides substantially that a majority of the ²³² board should constitute a quorum; that each commissioner, before entering upon his duties, should take and subscribe a prescribed oath of office, and give a bond in the sum of one thousand dollars; that all the powers and duties connected with, and incident to, the appointment, removal, government, and discipline of the officers and members of the fire and police department of the city should be invested in, and exercised by, the board of fire and police commissioners, and that such board should have the exclusive control of the licensing and regulating of the sale of intoxicating liquors in such city, with a referendum clause reserving the right to have submitted, under certain conditions, the question of the licensing of the liquor traffic in such city to the qualified electors thereof.

It is under the foregoing section that respondents claim to be officers, and which section relators insist is invalid and void under section 11 of article 3 of the constitution, which declares that: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." The constitutionality of said section 31 of the said act of 1897 is the important question presented for consideration. If said section is repugnant to the constitutional provision quoted, the demurrer to the answer of the respondents is well taken, and the writ prayed for in the relators' petition should be granted.

The eleventh section of article 3 of the state constitution has

been often before the court for consideration, and the intent, scope, and object to be attained by its adoption as a part of the fundamental law has been so well and clearly stated in numerous decisions, in this and other states, as to render unnecessary a general discussion of the subject anew at this time. It has been uniformly decided that the provision of the constitution is mandatory, and that the courts will not declare a statute unconstitutional unless it is clearly so. Furthermore, ²³³ that the object of this provision concerning title to bills is to prevent obnoxious and surreptitious legislation, and not to prohibit comprehensive titles: *White v. Lincoln*, 5 Neb. 505; *Paxton-Hershey Irrigating Co. v. Farmers' etc. Irrigating Co.*, 45 Neb. 884; 50 Am. St. Rep. 585; *Van Horn v. State*, 46 Neb. 62; *State v. Bemis*, 45 Neb. 724. An act is unconstitutional and void if the "title is not broad enough to include the subject matter of legislation": *Smails v. White*, 4 Neb. 353; *White v. Lincoln*, 5 Neb. 516; *Tecumseh v. Phillips*, 5 Neb. 305; *State v. Lancaster County*, 6 Neb. 474; *Burlington etc. R. R. Co. v. Saunders County*, 9 Neb. 507; *Ives v. Norris*, 13 Neb. 252; *Holmberg v. Hauck*, 16 Neb. 337; *Weigel v. Hastings*, 29 Neb. 379; *Sheasley v. Keens*, 48 Neb. 57. The purpose of the constitutional provision under consideration, as has been repeatedly declared to be, is to give notice, through the title of the bill, to the members of the legislature and the public, of the subject matter of the projected law—in other words, that the title should clearly indicate the legislation embraced in the bill. While the requirements of this clause of the constitution are mandatory, they are not to be exactly enforced, or in such a manner as to hamper or cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient if they are all referable and cognate to the subject expressed. When the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it. If the subject matter is within the scope of the title, the constitutional requirement is met: *State v. Lancaster County*, 6 Neb. 485; *State v. Ream*, 16 Neb. 683.

The decisions are numerous which hold that the title is bad which is not broad enough to include the subject matter of the bill. Thus, legislation is invalid which attempts to legalize bonds under a title authorizing their ²³⁴ issuance: *Hamlin v. Meadville*, 6 Neb. 234. The title, "An act regulating the herd-

ing and driving of stock," is not sufficiently broad and comprehensive to sustain a provision giving damages for the castration of animals in certain cases: *Ives v. Norris*, 13 Neb. 252. "An act to prevent the fraudulent transfer of personal property" is too restrictive to include legislation making it a crime to remove mortgaged property out of the county: *Ex parte Thomason*, 16 Neb. 239. In *Holmberg v. Hauck*, 16 Neb. 337, the same doctrine was recognized and applied, it being held that under the title of "An act to provide for the organization, government, and powers of certain cities," the legislature could not invest police courts with concurrent and coextensive jurisdiction with county courts of all ordinary civil actions. In *Touzalin v. Omaha*, 25 Neb. 817, the title of the act being, "An act to incorporate cities of the first class, and regulating their duties, powers, and government," it was ruled that a provision in such act forbidding the granting of injunctions to restrain the levy and collection of a special tax or assessment to pay the cost of any city improvement was not within the title, and for that reason was invalid. Section 5, chapter 66, of the Session Laws of 1895, providing for the leasing of convict labor, was declared to be in conflict with that clause of the constitution requiring the subjects of acts to be clearly expressed in their titles: *State v. Holcomb*, 46 Neb. 613. Chapter 57 of the Session Laws of 1889, known as the "Decedents' Law," was under consideration in *Trumble v. Trumble*, 37 Neb. 340, and held void, in that its object was not expressed in the title, and because it was, in effect, amendatory of other acts, which it did not contain.

The course of judicial decisions in this state firmly establishes the doctrine that as to original legislation, or acts complete in themselves and not amendatory in their character, the scope and purpose of the bill must be fairly reflected in its title. And the same rule is equally as applicable to amendatory statutes, according to the decisions²³⁵ of this and other courts. In *Tecumseh v. Phillips*, 5 Neb. 305, there was under consideration an act of the legislature of 1875, entitled, "An act to amend an act to incorporate cities of the second class, and to define their powers, approved March 1, 1871, and to legalize certain taxes therein mentioned," and it was held that the third section of said act, which attempted to legalize the expenditures of moneys derived from licenses for the sale of intoxicating liquors, was not embraced within the title to the act, and therefore void by virtue of section 11, article 3, of the state constitution. In *Burlington etc. R. R. Co. v. Saunders County*, 9 Neb. 507, it was

decided that the provision of the act of the legislature, approved February 25, 1875, entitled, "An act to amend 'An act to provide for the registration of precinct or township or school district bonds,' " which declares it to be the duty of county boards to levy the necessary taxes to meet the principal and interest of such bonds, was within the inhibition of that portion of the constitution of 1867 which reads, "No bill shall contain more than one subject, which shall be clearly expressed in its title," because such provision was not germane to the act amended, and hence not within the title. A provision in an amendatory act repealing a statute not connected with the subject of the amendment was declared invalid in *State v. Lancaster County*, 17 Neb. 85.

It is well settled that under the title of a bill to amend an existing act, or a section thereof, no amendment is permissible which is not germane to the subject of the original legislation: *Miller v. Hurford*, 11 Neb. 377; *State v. Pierce County*, 10 Neb. 476; *Trumble v. Trumble*, 37 Neb. 340. In *Miller v. Hurford*, 11 Neb. 377, this court said: "An amendment must be germane to the subject matter of the act or section to be amended. Our constitutional provision that 'No bill shall contain more than one subject, which shall be clearly expressed in its title,' is but making inviolable the rule governing legislative bodies, that 'No proposition or subject different from that under consideration ²³⁶ shall be admitted under color of amendment.' But if, under the pretext of amending a section, a subject entirely foreign to the subject matter of the section to be amended can be introduced, this barrier will be entirely broken down and the constitutional guarantee in effect destroyed."

The legislature of Michigan, in 1891, passed an act entitled, "An act to regulate the taking and catching of fish in the inland lakes of this state." This statute was amended in 1893 to extend its provisions so as to include other inland waters than lakes, under the title, "An act to amend section 1 of act No. 159, Session Laws, 1891, 'An act to regulate the taking and catching of fish in the inland lakes of this state.'" It was held in *Fish v. Stockdale*, 111 Mich. 46, that the amendatory law was unconstitutional in that its object was not disclosed by the title.

Under the title of "An act entitled a supplement to an act entitled 'An act to authorize the formation of railroad corporations and regulate the same,'" the legislature of New Jersey, in the body of the act, imposed upon railroad corporations the

duty of repairing bridges over public roads, and empowered the courts of chancery to decree a specific performance of this duty, while the act attempted to be amended provided for the reduction of the capital stock of railroad companies under certain conditions. It was held in *New York etc. R. Co. v. Montclair*, 47 N. J. Eq. 591, that the title of the act did not express the subject of legislation, but was vague and misleading, and the act was, therefore, unconstitutional and void. To the same effect is *Adams v. San Angelo Water Works Co.*, 86 Tex. 485.

In *Harper v. State*, 109 Ala. 28, an act entitled, "An act to amend an act for the trial of misdemeanors in Shelby county, approved February 12, 1891," was held to conflict with section 2, article 4, of the constitution of Alabama, which provides that "each law shall contain but one subject, which shall be clearly expressed ²³⁷ in the title," in so far as the act attempted to provide for the trial of felonies, since such crimes were not included in the title.

Under the authorities the following propositions governing the enactment of laws are embraced in section 11, article 3, of the constitution: 1. A plurality of subjects is prohibited; 2. The title of an act must fairly express the subject of legislation; 3. Matters can only be included in an amendatory bill which are germane to the original act; 4. An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections: *Ryan v. State*, 5 Neb. 276; *Smails v. White*, 4 Neb. 357; *Sovereign v. State*, 7 Neb. 409; *Lancaster County v. Hoagland*, 8 Neb. 38; *South Omaha v. Taxpayers' League*, 42 Neb. 671; *State v. Cobb*, 44 Neb. 434.

Tested by the principles just stated, is section 31 of said Senate File 176 (Sess. Laws, 1897, c. 14, p. 175), adopted by the legislature of 1897, and which purports to amend section 91 of article 1 of chapter 13 a of the Compiled Statutes of 1895, repugnant to the provisions of section 11 of article 3 of the constitution? The answer must be in the affirmative. This senate file does not purport to be a complete law for the government of cities of the class to which Lincoln belongs, but the title and the body of the act alike indicate that it was intended by the framers to be amendatory alone in its scope and purpose. The title specifies the amendment of certain sections, among others, section 91 of article 1, chapter 13 a, of the Compiled Statutes. And the body of the act provides "that section 91 shall be amended to read as follows:" No person in reading

this language would for an instant suspect that the new subject matter of legislation proposed was foreign to the original section. Yet, what are the facts? Speaking generally, the original section 91, sought to be altered and changed by the legislature of 1897, related to the licensing and regulating ²³⁸ of the sale of intoxicating liquors by the excise board, and the appointment by such board of a chief of police and other police officers, but contained no provision whatever as regards the creation, by appointment or otherwise, of an excise or any other board. An excise board was provided for by section 13 of article 1 of said chapter 13 a, in this unequivocal language: "There shall also be in each city governed by this act an excise board, consisting of the mayor, who shall be ex-officio member and chairman thereof, and two members elected by the city at large, who shall hold their offices for two years." Matter entirely separate and independent from any subject indicated by the title of the act of 1897, is included in the amendatory section 91, namely, a board of fire and police commissioners was created, and provision made for the appointment of the members thereof and their removal from office—a subject matter wholly foreign to the legislation embraced in the original section. By no reasonable interpretation can it be said that this new clause or provision injected into section 91 is a proper amendment of the subject matter of the original section. On the contrary, it is as plain as anything can be that such new clause or provision is amendatory of said section 13 of article 1, chapter 13 a, of the Compiled Statutes, which last-named section, as already indicated, provided for an excise board in each city governed by the act. Moreover, said new section 91 is amendatory of the second proviso clause to section 25, chapter 50 of the Compiled Statutes, 1895, entitled "Liquors," which declares "that in cities of the first class having more than twenty-five thousand (25,000) and less than eighty thousand (80,000) inhabitants the power to license the selling or giving away of any intoxicating, malt, spirituous, vinous, mixed, or fermented liquors shall be vested exclusively in the excise board of such cities." The new act attempts to change this by conferring the power to license and regulate the liquor traffic upon another body—the board of fire and police commissioners; not exclusively, however, ²³⁹ since the new act reserves the right to have that question determined by a vote of the electors of the city under certain contingencies. No reference is made to said section 25, either in the title or body of the said act of 1897.

The title to Senate File 176 is not general and comprehensive, but limited. It does not express any purpose to amend generally article 1 of chapter 13 a of the Compiled Statutes, but the amendment of certain sections is proposed. This title restricts the amendments to the particular sections mentioned in the title. To this all will agree. The object of an act cannot be broader than its title. Counsel for respondents concede that under the title in question the new matter ingrafted on a section must be germane to the original section. In the brief they say: "The rule that an amended section must be germane to the original section amended is not a rule established by constitutional authority directly, but is one which necessarily arises from a compliance with the above-named constitutional provision; and it simply arises from the fact that when a section is amended it is supposed to stand by itself in its amendment, to take unto itself a title which the subject matter of this section will allow, and must be confined to a single object. That an amended section must be germane to the section amended does not mean that it must be confined to the same limits; that it cannot be enlarged and extended beyond the limits of the original section. It only means that it must be confined to the same subject matter, or have the same object in view, and this subject matter or object may be general in its nature. So long as the legislature fairly confines itself to the object of the original section it is sufficient." But it did not so confine itself in this case. The general object of the original section was not offices or boards, but the licensing of liquors. If the title to a bill must be a fair index to the contemplated legislation, the attempted amendment of said section 91 failed by reason of the constitutional provision invoked by the relators. If said section 31 of Senate File 176 ²⁴⁰ which attempts to alter or change section 91, article 1, of said chapter 13 a, is upheld, the very object or purpose of the fundamental law is nullified and disregarded.

We have been cited to no authority precisely in point, although the views we have expressed are in harmony with the principles announced in the cases already referred to. The decisions now to be mentioned have more or less bearing upon the question under consideration.

The first clause of the syllabus in *Ex parte Hewlett*, 22 Nev. 333, is in this language: "Where the title states that the subject of an act is to amend one section of a former statute, the act cannot be extended to the amendment of other sections." Billow, C. J., in the course of his opinion, observes: "It is claimed,

first, that it is invalid because the title of the act does not express its subject. Stripped of its verbiage, the title states that it is to amend section 2 of the act of 1893. Section 1 provides for the amendment of section 2 of that act, as stated in the title, but from its subject matter, which is substantially, except as to dates, the same as section 1 of the act of 1893, it appears that section 1 is the section they really wished to amend. However, as the title states that it is an act to amend section 2 of the former act, and the body of the act repeats that statement, we are of the opinion that it must be taken just as it reads, although it would seem that a mistake has been made. But the most serious point is, that after stating in the title that the act is an act to amend but one section of the act of 1893, it goes on to amend sections 4 and 8 of that act, although, as just stated, there are but two sections to the act, and consequently no section 4 or 8 to be amended. Under these circumstances, it would seem that the last two sections of the act of 1895 are unconstitutional under the provisions of section 17 of article 4 of the constitution, which directs that 'each law enacted by the legislature shall embrace but one subject, . . . which shall be briefly expressed in the title.' Having seen fit to restrict the title of the act to amending but one section of the former ²⁴¹ act, the legislature cannot go on in the body of the act to amend other sections: *State v. Bankers etc. Mut. Ben. Assn.*, 23 Kan. 499; *Sutherland on Statutory Construction*, sec. 87."

The legislature of Colorado, under an act entitled, "An act to amend section 29 of chapter 95 of the General Statutes of the state of Colorado, entitled 'Roads and Highways,' and to repeal sections 30, 31, 32, and 33 thereof, and for other purposes," substituted a new section for section 29 of the original act, the four sections indicated in the title were repealed, and a new section was interpolated requiring persons and corporations having ten or more persons in their employ, liable to pay taxes, to furnish the overseer with their names, and prescribing penalties for their failure to comply therewith. In *Board of Commrs. v. Aspen Mining etc. Co.*, 3 Colo. App. 223, it was held that the subject matter of the said interpolated section was not germane to the act it was intended to amend, and could not be interpolated therein as an amendment, without conflicting with the provision of the constitution of Colorado similar to our section 11, article 3, under consideration. Reed, J., in delivering the opinion of the court, says: "It will be observed that in the title the specific changes are designated—the amendment of section

29, and the repeal of the four enumerated sections. Had the act been entitled, generally, as an act to amend chapter 95, any amendment germane and pertinent might have been made, but, being specifically limited to the sections designated, the interpolation of a new and different section was not permissible. And further changes than those designated were precluded by the specific enumeration of those named." The opinion, after citing the cases in support of the doctrine, continues with the following quotation from Cooley on Constitutional Limitations, fifth edition, 179: "As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might, with entire ²⁴² propriety, have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been unnecessarily restrictive. The courts cannot enlarge the scope of the title. They are vested with no dispensing power. The constitution has made the title a conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so."

In State v. Board of Commrs., 22 Nev. 399, a law entitled, "An act to amend an act entitled 'An act for the purchase and preservation of public newspapers printed and published in the several counties of this state,' approved February 1, 1865," to the extent it attempts to regulate the matter of legal advertising and printing, was decided to be in conflict with the provision of the constitution of Nevada requiring that each law enacted by the legislature shall embrace but one subject, which shall be briefly expressed in the title. If the subject of legal advertisement and printing was not included in the title of the original act, and was not germane to the subject matter, it is obvious that the clause embraced in the amendatory section 91 under review, relating to the creation of a board of fire and police commissioners, is not covered by the title to the act, and is not germane to the section proposed to be amended, but is amendatory of section 13 of article 1 of said chapter 13 a. We are constrained to hold said amendatory section 91 to be unconstitutional for the reason stated. It follows that the demurrer to the answer must be sustained, and a peremptory writ awarded as prayed.

Writ allowed.

THE PRINCIPAL CASE was followed in *State v. Stewart*, 52 Neb. 243, which was an original action in the nature of a quo warranto to oust the respondents from the offices of councilmen of the city of Lincoln, and to install the relators therein. The writ was denied. There were fourteen councilmen. The respondents were regularly nominated prior to March 16, 1897, but after such nominations were made, and prior to the city election held on April 6, 1897, the act known as the Senate File 176, mentioned in the principal case, was passed, with an emergency clause attached. This act purported to amend certain sections of the charter of Lincoln city, whereby, among other things, the number of councilmen was reduced one-half. The respondents were elected as members of the city council, and pursued and recognized the law of 1897, and ignored the old one. The relators contended that the act of 1897, under which the respondents claimed to exercise the functions of their offices, was unconstitutional and void. While the controversy, therefore, was over the title to the offices named, the important question presented for consideration was the constitutionality and validity of Senate File No. 176, approved March 20, 1897, and expounded in the principal case. Some additional points, however, concerning the amendment of statutes were decided in *State v. Stewart*, 52 Neb. 243, of which a note will here be made.

It will be noticed, as shown in the principal case, that the act mentioned was amended by reference to its title, and the court held that it is competent for the legislature to amend a statute by a proper reference to its title, or the number of the chapter and section as published in the Compiled Statutes; that it is not necessary for the title of the amendatory act to contain any reference to the title of the original act; and that the title to the act under consideration, when considered as a whole, distinctly points out the article and chapter where the amendatory sections were intended to apply: See *State v. Berka*, 20 Neb. 375; *Dogge v. State*, 17 Neb. 140; *Ballou v. Black*, 17 Neb. 389, cited by the court.

It was also held that, if an amendatory act contains a clause plainly indicating the purpose of the legislature to repeal the original sections amended, it meets the requirements of a constitutional provision declaring that an amendatory act shall "contain the section or sections so amended, and the section or sections so amended shall be repealed" though the intent to repeal may be inartistically and awkwardly expressed, and such repealing clause was drawn in the form of an amendment of the repealing clause of the act amended. "The amendment of the repealing clause of a prior law which is the subject of amendment, for the purpose of effecting a repeal of the original sections sought to be amended, is indeed novel," said Norval, J., "but it does not, for that reason, contravene any constitutional provision. The framers of this law had a perfect right to indulge in originality of expression, so long as the language employed reflected the intention of the lawgiver. As stated by counsel for respondents, 'the form of expressing the legislative intent to repeal the original sections amended, in form of amendment of the repealing clause of the original act, may make

a court or jurist smile, but does not obscure the legislative intent. That is clear enough, notwithstanding the unusual manner in which it is expressed. It is simply an instance of the inartistic methods of the ordinary layman when summoned by a constituency to sit in legislative halls and formulate results of legislative deliberation': State v. Stewart, 52 Neb. 243, 248.

Another point decided was that the unconstitutionality of a portion of a statute does not invalidate the remainder when the different parts are separable and the void portion was not the consideration or inducement for the legislature to adopt the part that is valid; but that, if the invalid portion of the act is so interwoven with the remainder that the act is not operative with the void part eliminated, or where it is obvious from an inspection of the act that the invalid part formed the motive or inducement to the residue, the whole act must fall. The following authorities were cited to support these propositions: State v. Moore, 48 Neb. 870; Tumbler v. Tumbler, 37 Neb. 340; Low v. Rees Printing Co., 41 Neb. 127; 43 Am. St. Rep. 670; German-American Fire Ins. Co. v. Minden, 51 Neb. 870; State v. Commissioners, 5 Ohio St. 497; Poindexter v. Greenhow, 114 U. S. 270; Slauson v. Racine, 13 Wis. 898; Dells v. Kennedy, 49 Wis. 555; 35 Am. Rep. 786; Black v. Trowers, 79 Va. 123; State v. Blend, 121 Ind. 514; 16 Am. St. Rep. 411; Johnson v. State, 59 N. J. L. 535; State v. Sinks, 42 Ohio St. 345; Copeland v. St. Joseph, 126 Mo. 417; Warren v. Mayor, 2 Gray 84. "In passing," said the court, "upon the constitutionality of a statute, we recognize the rule to be that it is the duty of the courts to reconcile the statute with the constitution, and sustain the law if possible to do so without doing violence to the fundamental law. All doubt must be resolved in favor of the validity of the statute. But the same rule does not obtain in all its force and vigor when passing upon a statute some parts of which have been declared unconstitutional. In such case, there is no presumption in favor of the legality of the remaining portion": State v. Stewart, 52 Neb. 243, 251; citing Martin v. Tyler, 4 N. Dak. 278. "In Skagit County v. Stiles, 10 Wash. 388, the court used this language: 'In determining whether a part of an act can stand where another part has been held unconstitutional, a different rule as to presumptions is recognized from that which obtains where the whole act is being considered. The general rule that legislative acts are primarily presumed to be constitutional, and that all intendments are to be made in favor of the act to give it effect according to the intent of the law-making power, does not apply in such cases, as the upholding of a part of an act is not favored, and where a part has been held unconstitutional and the remaining portion comes up for consideration as to whether it can stand as an independent proposition the presumptions are generally against it, and it will not be sustained unless that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected.'"

In passing upon the amendatory law above mentioned, the court further held that the rule to be applied to the amendment of each

particular section of the thirty-three designated in this act was precisely the same as if the amendatory act consisted of a single section; that if an amendatory section of an act contains subject matter not expressed in the title of the act, nor germane to the original section, but is amendatory of prior laws, it is unconstitutional and void; that, as the amendatory section 91 was the consideration or inducement for the passage of the amended section 13 of the same act, which reduced the number of councilmen one-half, both sections had to fall together, the unconstitutionality of the former section invalidating the latter, leaving the original sections in full force and effect, and not superseded; that, while the official tenure of councilmen, not being fixed by the constitution, might be shortened or terminated at the will of the legislature, the law for that purpose must be constitutionally adopted, and that this was not done; that while the repeal of section 10 of the amendatory act under consideration destroyed or took away the authority to create wards, it did not have the effect to abolish existing wards; and that, therefore, the city council of Lincoln was composed of fourteen members, two from each of the wards of the city. The result was, that, while the sections of the law mainly relied upon by the respondents were pronounced unconstitutional, the relators were held not to be entitled to the offices; and it was declared to be wholly immaterial that the respondents pursued and recognized the law of 1897, and ignored the old one.

STATUTES—TITLES—AMENDMENTS.—The title of an act must express the subject matter, and must not include two or more subjects or objects. Provisions of an act not embraced within its title are void; but if the provisions of the act are all germane to the general subject expressed in the title, the title is sufficient. The constitutional provision as to the titles of statutes is mandatory, though it is to be liberally construed. Generality of title is not objectionable, but the provisions of the act must all be germane to the general subject expressed in the title. The rule as to the title and matters of an original act applies to an amendatory act. The title of an amendatory act must be germane to the original act. These matters, and other similar questions, are discussed at length in the monographic note to *Bobel v. People*, 64 Am. St. Rep. 70-107, on the sufficiency of the title to a statute.

OMAHA v. BOWMAN.

[52 NEBRASKA, 293.]

MUNICIPAL CORPORATIONS — POND — NEGLIGENCE CAUSING DEATH—LIABILITY OF CITY.—A city is not answerable for the death of a child from drowning in a pond situated on private property, not in dangerous proximity to a public highway, although the city may have created the pond by overflowing the property without objection from the owner. In such a case, the city owes no duty to the general public, aside from that of a sanitary character, other than such as devolves upon the owner of the real property submerged.

NEGLIGENCE—EVIDENCE—PROXIMATE CAUSE OF INJURY.—Negligence is a fact to be shown by evidence. Its existence

cannot be left to mere conjecture, and it must be the proximate cause of the injury of which complaint is made.

MUNICIPAL CORPORATIONS—ACTION FOR NEGLIGENCELY CAUSING DEATH—ERRONEOUS INSTRUCTIONS.—If a city overflows lots without objection from the owner, creating a pond thereon, but not in dangerous proximity to a public highway, and a child is accidentally drowned therein, it is error, in an action to recover against the city for the death, to give instructions which assume that the city could be held liable, if the evidence proves an injury, caused by the massing of the water on the lots, which would entitle the lotowners to damages.

W. J. Connell and E. J. Cornish, for the plaintiff in error.

Silas Cobb, for the defendant in error.

²⁹⁴ RYAN, C. This action was brought in the district court of Douglas county by Fannie E. Bowman, as administratrix of the estate of Albert D. Bowman, for the recovery of damages sustained by the estate of the intestate by reason of his death. The deceased, it was alleged in the petition, was about seven years of age when he was drowned in a pond of water which plaintiff in error negligently had permitted to accumulate and be, and remain in, over, and by, the side of Davenport street in the city of Omaha. There was a verdict and judgment against the city in the sum of one thousand dollars. The accident happened on June 15, 1892. The evidence showed that about six years before the date just named the city had constructed an embankment on Davenport street which interfered with the flowing of water from certain lots abutting on said street. The pond in question was caused by this water. The sidewalk was about seven feet from the water and quite a distance above the water level. There seems to be no dispute in the evidence that to reach the water from the street it was necessary that a person should cross an intervening strip of private property at least six feet in width. A few days before the date of the accident some boys tore ²⁹⁵ up a part of the sidewalk and launched it on the pond. Albert D. Bowman, and some juvenile friends, took possession of this piece of sidewalk and were using it for a raft, when young Bowman fell off and was drowned. The mere fact that he was thus drowned was alleged in the petition and admitted in the answer. There was no effort to show whether the deceased reached the pond, as he might have done, by passing from his home near by, over private property, or by way of the street. It is not clear from the petition just what acts and omissions on the part of the city are claimed to constitute negligence on its part. There was charged a failure to place a fence, or visible

boundary, between the street and the private property adjoining. In view of the fact that it was not claimed that the child entered the water from the street, this averment has no bearing on the questions under consideration. The following averments seem to have described the negligence principally, if not entirely, relied upon, and we shall therefore quote them at length: "Plaintiff further states that said pond of water was formed by the water that formerly would have run through a ravine at said place, the same being filled over at said place by said city in constructing and filling up Davenport street at said place, which said water was negligently permitted to accumulate and remain as aforesaid, and the natural outlet for said water being closed and filled up by the defendant city of Omaha a long time previous to the said June 15, 1892, by the city filling up the street at said Davenport, near Twenty-eighth street, and thereabouts, where said death occurred, being filled about five feet on the north side and about fifteen feet on the south side of said Davenport street, and thereby filling up and stopping a creek or ravine that was wont theretofore to flow along where said street was filled as aforesaid, and although there is, and has been a long time prior to June 15, 1892, a sewer about two blocks away from the place of said death, yet there was no provision made for the drainage of said water by the city or ²⁹⁶ said Moody and Stockdale (the owners of the private property on which the pond was), from said lots, said water thereby being discharged upon said lots in and over and upon Davenport street as aforesaid, and there negligently confined, and negligently by all of said defendants permitted to remain upon said property." In this connection, it was alleged that the pond caused in the manner above described had, before June 15, 1892, been dangerous and menacing for many years, was very enticing and attractive to children of tender age, many of whom in that locality were in the habit of playing in said pond of water, and that the dangerous, menacing, and enticing condition of the pond had been well known by said Moody and Stockdale and the officers and authorities of the city of Omaha at the time of and before said death.

The defendant in error was permitted to recover upon a theory rather narrower than that above stated, as appears from the following instruction given by the court: "1. The court charges the jury that if the grade and fill was over and across the ravine, through which, prior to the filling, water from springs and the drainage from the vicinity was accustomed to flow, then it was the duty of the defendant, in making said fill, to provide a pas-

sageway for the escape of the water which might reasonably be expected to flow along the course of the ravine." The instruction following that above quoted was in this language: "2. If, by reason of the failure of the defendant when making the fill in Davenport street to provide a culvert or other passage for the water naturally flowing in and along the ravine, the pond in question was formed, and you shall so find from the evidence, then that is a fact that you should consider along with other facts as hereinafter instructed in making up your verdict."

In the brief for the defendant in error it is insisted that this court, in *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546, has recognized the applicability of the principles laid down in the above instructions to the facts in this case. In ²⁰⁷ the case just cited there was involved the question of the liability for the diversion of water from a watercourse by the city, it is true, but this liability was for physically damaging the real property of a private person. The rule is general that the city may not divert the flowage of a running stream from real property or mass its water on such property, without making compensation for such damage as thereby may ensue to the property rights of the owner. This principle is in no manner connected, however, with, or correlative of, the proposition contended for, and that is that the massing of the water of a flowing stream on private property renders the city liable to one who has no interest in such property, for whatever personal damages he may sustain from his own voluntary use of such water. It is also urged that these instructions were correctly given in this case in view of the holding of this court in the case of *Omaha v. Richards*, 49 Neb. 244, and in the opinion on the rehearing on the same case, reported in 50 Neb. 804. In both the opinions there was enforced the liability of the city for damage caused by the drowning of a child. The negligence of the city consisted in permitting water to collect and remain on a traveled street without any precaution being taken to avoid accidents therefrom to the public. The pond which formed was partly in the street and partly on private property, and it was held that the mere fact that the child had fallen off the improvised raft into the water on the private property did not exonerate the city from the consequences of its negligence. Whether the water was that of a flowing stream or was the accumulation of surface water was a question of no importance.

As has already, perhaps, been sufficiently indicated, there is presented in the case at bar the question of the liability of a city

for the death of a child from drowning in a pond situated on private property. This child is not shown to have used the street in any way, even for the purpose of reaching the pond in which afterward he ²⁹⁸ was drowned. This question is connected with, or modified by, no other, as, for instance, the fact that the city had invited the public to go upon, or even in dangerous proximity to, the water. In so far as the facts of this case are disclosed, there is shown nothing of the acts of the child before its presence on the raft. That fact was merely alleged and admitted by the pleadings. The inducement charged was, that the water was enticing to a person of the age of this one. This was a statement of a general proposition applicable to the attraction of any body of water for boyish nature. In what was the city negligent, in its duty toward the public, by passively permitting, or actively causing, the accumulation of this water on private property? We have already pointed out the fact that we are not considering the property rights of the owner of the lots whereon the pond was formed. There is involved no element of damage resulting from loathsome smells or from dangerous sanitary conditions permitted by the city in violation of its duties in that respect. Simply stated, the fact is that the city—so far as the record shows, without any objection from the owner of the lots—overflowed said lots with water. In respect to the public traveling upon its highways, except as above indicated, the city, with respect to the pond formed in the manner indicated, held the same relations as did the owner of the real property submerged. In *Richards v. Connell*, 45 Neb. 467, these relations, with the attendant obligations and liabilities, were fully considered and it was held that a cause of action could arise in none but one of the following classes of cases: “1. Cases in which the owner of the land has made or permitted a dangerous excavation, or embankment, or the like so near a public highway as to injure one in the rightful use thereof. . . . 2. Cases in which the defendant has negligently left exposed dangerous machinery likely to attract children and resulting in their injury. Illustrative of this class which constitutes a recognized exception to the rule are the so-called turntable cases. 3. Cases where the plaintiff was ²⁹⁹ injured while upon the defendant’s premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition.” This case has been cited with approval in *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, in which, as well as in the two opinions of *Omaha v. Richards*, 49 Neb. 244, 50 Neb. 804, the adjudicated cases are

reviewed to sustain the proposition above stated. In an opinion on a rehearing of *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, it was pointed out that the principal of the turntable cases should not be applied because a turntable is not only a danger specially created by its owner but it is a danger differing in kind from those under consideration. "A pond," said Beatty, J., "although artificially created, is in nowise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly, no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always safe and often necessary, and, where they do not exist naturally, must be created in order to store water for stock and for domestic purposes, irrigation, et cetera. Are we to hold that every owner of a pond or reservoir is liable for damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out."

Referring back to the three classes of cases described in *Richards v. Connell*, 45 Neb. 467, it may be said confidently that this case falls within neither. The intestate, uninvited by the city, on private property, took possession of ³⁰⁰ a fragment of a floating sidewalk, from which, accidentally, he fell into the water. Negligence is a fact to be shown by evidence. Its existence cannot be left to mere conjecture: *Kilpatrick v. Richardson*, 37 Neb. 731; 40 Neb. 478; *Omaha etc. R. R. Co. v. Clarke*, 39 Neb. 65; *Omaha Street Ry. Co. v. Leigh*, 49 Neb. 782. The negligence pleaded and proved must be the proximate cause of the injury of which complaint is made: *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563; 58 Am. St. Rep. 709. There was not sufficient evidence to meet the first of the above requirements, and, as to the second, there was not only a failure of proof, but the instruction hereinbefore quoted proceeded upon the theory that the city could be held liable for the injury of a person on a state of facts showing that the injury, if any, was one to the mere property right of an individual not a party to the suit.

For the errors indicated the judgment of the district court is reversed.

Harrison, J., not sitting.

MUNICIPAL CORPORATIONS—PLACE ALLURING TO CHILDREN—INJURY—LIABILITY.—A municipal corporation is not answerable for leaving a place alluring to children exposed without barriers, when such place can only be reached by leaving the highway and becoming an intruder or trespasser upon the premises of another. Its duty does not extend to the protection of children against every sudden freak that may possess them: *Clark v. Richmond*, 83 Va. 355; 5 Am. St. Rep. 281; monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 423, on negligence in dealing with children. And the owner of a city lot is not liable for the death of a child who falls into an unfenced pond on his lot, it not being so near the street as to be dangerous to passers: Note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 424.

NEGLIGENCE — PROOF—PROXIMATE CAUSE.—Negligence must not only be alleged and proved, but it must also be shown that it caused the injury complained of: *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323; 19 Am. St. Rep. 174.

FERGUSON v. STATE.

[52 NEBRASKA, 432.]

BURGLARY—BREAKING—WHAT IS.—A breaking, to constitute the crime of burglary, may be by any act of physical force, however slight, by which the obstruction to entering is removed.

BURGLARY—BREAKING—ILLUSTRATIONS.—The lifting of a hook by which a door is fastened, and opening the door in order to enter a building, is a "breaking" within the law of burglary, although the entry might have been effected without a breaking, as through an open door.

BURGLARY—INSTRUCTIONS.—A SLIGHT ERROR in an instruction, whereby a matter, not in evidence, is injected into a prosecution for burglary, is no ground for reversal, where it is evident that the rights of the defendant were not prejudiced by the inaccuracy.

BURGLARY—INFORMATION—TIME AS TO COMMISSION OF CRIME.—It is not essential to a conviction for burglary that the crime should have been committed on the precise day laid in the information. It is sufficient if it is proved to have been committed within the time limited by the statute for the prosecution of such crime.

BURGLARY—INSTRUCTIONS.—TIME is not of the essence of the crime of burglary, and it is not, therefore, error to instruct the jury that it is sufficient to find that the crime was committed "on or about" the time charged in the information, or at any time within the statute of limitations.

BURGLARY — LARCENY — INSTRUCTIONS — ASSUMING FACTS.—To instruct the jury that, under an information for burglary, the accused may be found guilty of larceny, does not assume that a burglary has been committed.

INSTRUCTIONS — CRIMINAL LAW.—REASONABLE DOUBT is properly defined, in an instruction, as being "an actual, substantial doubt of guilt arising from the evidence, or want of evidence, in the case."

INSTRUCTIONS—CRIMINAL LAW—VAGUENESS.—The accused cannot complain of the vagueness of an instruction, where he did not request an instruction embodying his views upon the point.

INSTRUCTIONS—CRIMINAL LAW—FAILURE OF ACCUSED TO TESTIFY.—Under a statute providing that the neglect or refusal of the defendant, in a criminal case, to testify, shall not "create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal," it is not reversible error to instruct that: "The defendant has not testified on his own behalf in this case as he had a lawful right to do. Nothing must be taken against him because he has not so testified."

INSTRUCTIONS—CRIMINAL LAW—ALIBI.—A failure to instruct the jury upon the defense of an alibi is not reversible error, where no request was made for such an instruction.

Bane & Altschuler, for the plaintiff in error.

C. J. Smyth, attorney general, and Ed. P. Smith, deputy attorney general, for the state.

⁴³³ **NORVAL, J.** The defendant, Charles Ferguson, was prosecuted for, and found guilty of, the crime of burglary; and from a judgment of conviction error proceedings have been prosecuted to this court. The information charges the crime to have been committed by breaking and entering, in the night season, a certain barn owned by Adolph Zimmerer, with the intent to commit a larceny.

The first contention is, that the evidence is insufficient to sustain the verdict. The testimony adduced by the state on the trial, and which is incorporated in the bill of exceptions, establishes beyond a shadow of doubt that during the night of the twenty-eighth day of May, 1896, the accused entered the barn of the prosecuting witness, in Otoe county, and stole therefrom a set of harness; that the door through which the entry was effected was a double door, sawed in two parts, one being immediately above the other. In the evening in question the upper door was left standing open, while the other was fastened, closed with a hook and staple; that the defendant raised this hook and opened the lower door in order to enter the barn. The point is made, in argument, that this did not constitute a breaking and entering, or a burglary, because the upper door being open at the time, ⁴³⁴ there was no obstruction of the free ingress to, or egress from, the barn. That a person could have bounded over the lower door and entered the building is wholly immaterial, unless the entrance was actually effected in that manner, which the proofs disclose was not the case. The question was not whether the defendant could have entered the barn

without a breaking had he so desired, but, Did the lifting of the hook and opening the door which it fastened constitute a breaking within the meaning of the law? The answer must be in the affirmative: *State v. O'Brien*, 81 Iowa, 88. In *Metz v. State*, 46 Neb. 547, it was decided that a breaking, to constitute the crime of burglary, may be by any act of physical force, however slight, by which the obstruction to entering is removed. This is a familiar principle of criminal law, and, applying it to the facts in this case, there is no room to doubt that there was a "breaking" within the definition of burglary.

In the sixth instruction the jury were told that if the defendant, with a felonious intent, entered the barn "by opening a door or removing a window," it constituted burglary. The instruction is not assailed because it gave an incorrect definition of the crime charged, but that the use of the words "or removing a window," injected a matter not in evidence. This criticism is well founded, but we are unwilling to predicate a reversal upon that slight error, since it is very evident that the rights of the defendant were in no manner prejudiced by this slight inaccuracy in the instruction: *Converse v. Meyer*, 14 Neb. 190; *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339; *Debney v. State*, 45 Neb. 856.

Exception is taken to the giving of the following instruction: "7. The court instructs the jury that the allegation of time in the information filed in this case is only material for the purpose of fixing the commission of the crime within the statute of limitations, which, in the state of Nebraska, is three years for the crime of burglary. And if you find from the evidence, beyond a reasonable doubt, that the defendant forcibly, feloniously, and burglariously, ⁴³⁵ did, on or about the twenty-eighth day of May, 1896, in the night season, at the place charged in the information, break and enter the barn of Adolph Zimmerer by opening a closed door, as explained in these instructions, and, after so entering said barn of said Adolph Zimmerer, did feloniously take therefrom any property of any value belonging to said Adolph Zimmerer, then your verdict should be guilty as charged in the information." The objection to this portion of the charge is twofold: 1. The authorization of a conviction if the offense was committed at any time within the statute of limitations is claimed to be wrong. The decisions are the other way. The identical question was passed upon in *Palin v. State*, 38 Neb. 862, where this language was used: "The allegation in the information as to the time the crime was committed is not ma-

terial. The state was not required to prove that the transaction occurred on the day alleged, but it is sufficient if proven to have been committed within the time limited by the statute for the prosecution of the offense." In *Yeoman v. State*, 21 Neb. 171, the same principle was stated and applied. The question has been set at rest by those decisions, if, indeed, it was ever a doubtful one in this state. 2. The instruction quoted is further criticised for the use of the words "on or about." Time was not of the essence of the offense, and it was not error to direct the jury that it was sufficient to find that the crime was committed on or about the time charged in the information: *State v. Fry*, 67 Iowa, 475; *State v. Williams*, 13 Wash. 335; *State v. Thompson*, 10 Mont. 549; *State v. Harp*. 31 Kan. 496.

The next assignment of error relates to the giving of the following portion of the eighth instruction: "8. The jury are instructed that under an information for burglary the accused may be found guilty of larceny, and if in this case the jury are not satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the burglary as charged in the information, still, if ⁴³⁶ the jury believe from the evidence, beyond a reasonable doubt, that the defendant did steal the goods described in the information, from the possession of the said Adolph Zimmerer, then the jury may, under this information, find the defendant guilty of larceny." The objection brought forward against the foregoing is, that it assumed a burglary had been committed, and withdrew that question of fact from the consideration of the jury, and *Metz v. State*, 46 Neb. 547, is relied upon to sustain the argument. This criticism is absolutely without foundation. From the language complained of no fair inference can be drawn that the trial court assumed or stated as a fact that a burglary had been committed by anyone, much less by the defendant. That question was left for the jury to ascertain from the evidence, and if they failed to find that the crime of burglary had been committed, as charged in the information, then the jury were directed to ascertain and determine whether or not the accused was guilty of larceny of the harness. The decision in the *Metz* case lacks analogy. There the trial court instructed the jury: "If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the storehouse or warehouse of the said Jasper N. Binford, and the larceny of the corn therefrom, portion of the said corn so stolen was in the exclusive possession of the defendant George Metz, you are instructed that this circumstance, if so proven, is

presumptive, but not conclusive, evidence of the defendant's guilt." Undoubtedly, the foregoing practically told the jury that a burglary had been committed at the storehouse, and that the corn had been stolen therefrom; and this court so held. The mere quoting of the two instructions is sufficient to make plain that the case cited has no bearing upon the question under consideration.

The ninth instruction is assailed, which is in this language: "9. You are instructed that by the words 'reasonable doubt,' as used in these instructions, is meant an actual, substantial doubt of guilt arising from the evidence, ⁴⁵⁷ or want of evidence, in the case." The objection raised by counsel for the accused to this instruction is that "it is impossible to tell from the instruction whether the doubt of guilt must arise from the evidence on the part of the state, or want of evidence on the part of the defendant." The court's definition of a reasonable doubt will not bear any such interpretation. The idea plainly conveyed by this portion of the charge is, that if the jury, on the consideration of the evidence introduced by the state and defense, or for any lack of evidence in the case, entertain a reasonable doubt of the guilt of the accused, there must be an acquittal. The court's definition of a "reasonable doubt" was in form approved by this court in *Langford v. State*, 32 Neb. 782.

Objection is made to the tenth instruction given by the court on its own motion, which reads: "10. You are instructed that the defendant has not testified on his own behalf in this case as he had a lawful right to do. Nothing must be taken against him because he has not so testified." Two criticisms are urged against the giving of this portion of the charge: 1. That it is too indefinite and uncertain; 2. That without a request it was error for the court, in any manner, to refer to the fact that the defendant had not himself given testimony in the case. If counsel for accused did not regard the words, "nothing must be taken against him because he has not so testified," sufficiently specific and definite, he should have drafted and presented to the court an instruction embodying his views upon the point. Having failed to do so, he cannot complain of the vagueness of the instruction: *Gran v. Houston*, 45 Neb. 813; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409. The provision of the statute relied upon in support of the second objection to said instruction is section 473 of the Criminal Code, which provides: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person

so charged shall, at his own request, but not otherwise, be deemed a competent ⁴³⁸ witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal." The argument of the prisoner's counsel is, that this statute expressly prohibits any reference whatever being made to the fact that the defendant omitted to testify, at least unless here is a request for an instruction to that effect; and in support of the point is cited the case of *State v. Pearce*, 56 Minn. 226. In *Metz v. State*, 46 Neb. 547, a reversal was sought on the ground that the court failed to instruct that the neglect of the defendant to testify created no presumption against him. The court quoted section 473 of the Criminal Code, and said: "The defendant has availed himself of the protection of the court to instruct the jury that no presumption of guilt arose from his failure to testify; but he did not request the court to so charge, and error cannot be successfully assigned upon the omission of the court to give such an instruction on its own motion." The fair and reasonable inference to be drawn from this language is, that it is discretionary with the trial judge whether he will instruct, or will not charge, the jury upon the question where no request has been made to so instruct. And counsel for defendant concede that, with a request for such an instruction by the accused, it may be properly given. It is evident that if the court had the right to give such instruction, had it been requested to do so by the defendant, it was not reversible error to give it in the absence of such request. Under the statute of this State, persons upon trial for crime may, at their own request, but not otherwise, be competent witnesses. The failure of a prisoner to avail himself of the right to be sworn and testify in his own behalf the legislature has declared shall create no presumption against him, and that no reference shall be made to it, nor any comment upon such neglect or refusal. Certainly, it would be reversible error for the prosecuting officer to allude to the fact that the defendant had failed to be ⁴³⁹ sworn, or for the judge to refer to it, or comment upon such omission in his instructions, unless explained to the jury in the same connection by a direction that the omission to be a witness created no presumption of guilt against the accused, or by the use of some other equivalent statement of the effect of the statute. When a prisoner is not sworn, it is the duty of the court to inform the jury, if requested to do so, that they are not to draw any inference of guilt from the fact that

he did not testify. If the jury, in the case at bar, had not been so directed, they might have regarded, as a criminating circumstance, the fact that he had not been sworn. The instruction, instead of being prejudicial to the accused, was favorable to him. The Minnesota case cited by counsel is predicated upon a law materially different from the section of the statute of this state relating to the question of a defendant being sworn in his own behalf on a criminal trial. In that state the court, as well as the prosecuting attorney, is prohibited by express statutory provision from making any reference or comment upon the neglect or refusal of defendant to testify. Our statute is not so broad. It does not forbid the trial court from stating the fact of the omission to testify, and informing the jury, in the same connection, that no presumption of guilt should be indulged from such omission or neglect. The statute of Illinois upon the subject provides: "A defendant in a criminal case or proceeding shall, at his own request, be deemed a competent witness, and his neglect to testify shall not create a presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." The supreme court in that state, in *Farrell v. People*, 133 Ill. 244, construing said statute, which is almost in the same language as our own, held: "When defendant does not testify, it is reversible error to refuse to instruct the jury that no presumption of guilt should be indulged against him on that account." There was no prejudicial error in giving the tenth instruction in the case before us.

440 The next assignment relates to the failure of the court to instruct the jury upon the defense of an alibi. No instruction having been requested upon this branch of the case, error cannot be successfully assigned upon the omission of the court to instruct the jury on the law of an alibi: *Hill v. State*, 42 Neb. 503; *Housh v. State*, 43 Neb. 163; *Metz v. State*, 46 Neb. 552; *Pjarrou v. State*, 47 Neb. 294.

We have carefully considered the other assignments of error which relate to the rulings of the court upon the admission of testimony and find nothing therein prejudicial to the rights of the accused.

The judgment is affirmed.

BURGLARY—BREAKING—INSTRUCTIONS.—The opening of a closed door, though it is neither latched, bolted, nor locked, the holsting of a window, or the breaking of a pane of glass, and effecting an entrance into a house thereby, is such breaking as constitutes

burglary: *Grimes v. State*, 77 Ga. 762; 4 Am. St. Rep. 112, and note. See, also, *Kent v. State*, 84 Ga. 438; 20 Am. St. Rep. 376. If the crimes of burglary and larceny are committed together they may be prosecuted separately: *State v. Hackett*, 47 Minn. 425; 28 Am. St. Rep. 380. The mere failure to charge a jury on a particular point is not error, where no instruction upon the point was requested: *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179; 23 Am. St. Rep. 327; and an instruction, though erroneous, is no ground for reversal, if it was manifestly not prejudicial: *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277; 47 Am. St. Rep. 103.

INSTRUCTIONS—CRIMINAL LAW—PLEADING.—It is proper to instruct a jury that unfavorable inferences are not to be predicated upon the fact that the defendant, in a criminal case, did not take the witness stand: *People v. Seaman*, 107 Mich. 348; 61 Am. St. Rep. 326. A "reasonable doubt" in an instruction, is properly defined as "an actual, substantial doubt of guilt, arising from the evidence, or want of evidence, in the case": See monographic note to *Burt v. State*, 48 Am. St. Rep. 569, on definitions of reasonable doubt. See, also, *State v. Gleim*, 17 Mont. 17; 52 Am. St. Rep. 655, and note. In criminal pleadings, the time at which an offense is charged to have been committed is not material, unless time is of the essence or gist thereof: *Dill v. People*, 19 Colo. 469; 41 Am. St. Rep. 254, and note, showing that it is only necessary to show that the offense was committed prior to the finding of the indictment and within the statute of limitations.

OCOBOCK v. BAKER.

[52 NEBRASKA, 447.]

JUDGMENT—LIEN OF, ATTACHES WHEN—STATUTE.—The statute of Nebraska makes a judgment, not rendered by confession, and not rendered at the same term of court at which the action is brought, a lien upon the lands of the judgment debtor from the first day of the term of court at which the judgment is rendered, and parties dealing with real estate are charged with notice of pending suits against their grantor in the district courts of the county where the land is situate.

JUDGMENT AND MORTGAGE LIENS ATTACH WHEN—PRIORITY.—If a term of court begins on a certain date, during which a judgment is rendered, not by confession, in an action commenced prior to such date, and during the term, but before the rendition of the judgment, the judgment debtor mortgages a portion of his real estate, the lien of the judgment attaches, under the statute of Nebraska, against the real estate of the judgment debtor, from and after the first day of such term of court; and the lien of the judgment is prior to the lien of the mortgage, though the latter is filed for record prior to the date of the rendition of the judgment.

MORTGAGE AND JUDGMENT—REGISTRATION—CONSTRUCTIVE NOTICE—PRIORITY.—The registry laws apply to subsequent purchasers and encumbrancers only. Hence, if a judgment lien, by force of the statute, attaches in favor of a bank from and after the first day of the term at which it is rendered, though a mortgage on the property is filed for record after such day and before the judgment is actually rendered, the bank is a prior encumbrancer, and the record of the mortgage is not, therefore, constructive notice to the bank of the existence of the mortgage, for the bank is not charged with constructive notice of instruments af-

fecting the real estate upon which its judgment is a lien, and which are filed for record subsequent to such first day of the term.

THE DOCTRINE OF SUBROGATION OR SUBSTITUTION does not flow from any fixed rule of law. It is applied by courts of equity to prevent a miscarriage of justice, and it is a familiar principle that "he who asks equity must do equity."

MORTGAGES—SUBROGATION OF MORTGAGEE TO LIEN OF JUDGMENT CREDITOR—LACHES.—If the lien of a judgment is prior to the lien of a mortgage, and the judgment is a lien upon lands not covered by the mortgage, the mortgagee is not entitled to be subrogated to the judgment creditor's lien against the land covered by the mortgage where the judgment creditor, with notice of the existence of the mortgage, releases from the lien of his judgment lands not covered by the mortgage of value sufficient to satisfy his judgment, but was, at no time prior to such release, notified by the mortgagee that he would be required or expected to collect his judgment from the lands of the debtor upon which the mortgage was not a lien. The mortgagee's right to subrogation, in such a case, is forfeited by his laches.

George H. Thummel, for the appellant.

R. R. Horth, W. H. Thompson, W. H. Platt, Charles G. Ryan, Abbott & Caldwell, and W. A. Prince, for the appellees.

448 RAGAN, C. This is an appeal from a decree of the district court of Hall county. The undisputed facts are briefly as follows: On November 20, 1893, A. H. Baker owned certain real estate in Hall county. On that date was begun a term of the district court of said county. During the term a judgment was rendered against Baker in favor of the Security National Bank. The judgment was not by confession and the action in which it was rendered was not commenced at or during the term at which the judgment was rendered. On December 2, 1893, Baker mortgaged certain real estate in said Hall county to A. W. Ocobock, which mortgage was duly filed in the office of the register of deeds of said county on said date. Subsequent to the filing of Ocobock's mortgage the bank released from the lien of its judgment a large amount of real estate situate 449 in Hall county belonging to Baker, and which real estate was not covered by the Ocobock mortgage. The value of the real estate released by the bank from the lien of its judgment exceeded the amount of its judgment against Baker. At the time the bank released these lands from its judgment lien it had no actual knowledge of the existence of the Ocobock mortgage. Ocobock at no time prior to the bank's releasing its judgment liens notified it that he desired it would first exhaust its liens upon the lands of Baker not covered by his mortgage; nor that he should require it, the bank, to first

exhaust the lands of Baker on which he, Ocobock, had no lien. The lands covered by the Ocobock mortgage are not of sufficient value to pay the debt secured and the bank's judgment.

During the month of December, 1893, one Vest was the cashier and managing officer of the bank. During that month there was a daily publication, or "daily report," circulated among subscribers in the city of Grand Island, where the bank was situated, of the transactions occurring the previous day in the office of the register of deeds, so far as the same affected conveyances and encumbrances of real estate. This daily publication, or report, gave the names of the grantors and mortgagors, grantees and mortgagees, the character and date of the instrument, the consideration for the conveyance, and a description of the real estate encumbered. The cashier of the bank was a subscriber to this publication. The fact of the making of the mortgage by Baker and wife to Ocobock was set out in the publication, and this publication the cashier of the bank saw and read prior to the date of releasing the bank's judgment lien on the lands of Baker not covered by the Ocobock mortgage. Ocobock brought suit to foreclose his mortgage and made the bank a party defendant. The bank filed a cross-petition setting up its judgment, and claimed a first lien upon the real estate described in Ocobock's mortgage. The latter claimed that, by reason of the bank's having released ⁴⁵⁰ from the lien of its judgment lands of Baker not covered by his mortgage of greater value than the amount of the bank's judgment, he was entitled to be subrogated to the bank's lien upon the lands of Baker covered by the mortgage. The district court decreed that the bank was entitled to a first lien upon the mortgaged real estate and Ocobock has appealed. The decree of the district court is right.

1. The judgment of the bank, not being by confession, and having been rendered in an action commenced prior to the beginning of the term at which the judgment was rendered, became a lien upon the lands of Baker situate in Hall county from and after the first day of the term of court at which the judgment was rendered, namely, November 20, 1893, and such a lien was a superior lien to the mortgage of Ocobock filed December 2, 1893, though the mortgage was filed before the date the judgment was actually rendered: See Code Civ. Proc., sec. 477; *Norfolk State Bank v. Murphy*, 40 Neb. 735.

2. It is a general rule that if a creditor having a choice of two funds should, contrary to equity, so exercise his legal rights

as to exhaust that fund to which only other creditors can resort, then those other creditors will be placed by a court of equity in his situation so far as he has applied their fund to the satisfaction of his claim: Chief Justice Marshall in *Alston v. Munford*, 1 Brock. 279. See, also, *Cheesbrough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494; *Iglehart v. Crane*, 42 Ill. 261; *Hosmer v. Campbell*, 98 Ill. 572.

3. The record of Ocobock's mortgage was not constructive notice of its existence to the bank. The bank was not charged with notice of deeds or mortgages affecting the real estate upon which its judgment was a lien filed for record subsequent to November 20, 1893. The registry laws apply to subsequent purchasers and encumbrancers only: *Hosmer v. Campbell*, 98 Ill. 572. And paradoxical as it may seem, the bank was a prior encumbrancer of this land to Ocobock, though its judgment was⁴⁵¹ not rendered until after the filing of Ocobock's mortgage. This is because the statute makes a judgment not rendered by confession, and not rendered at the same term of court at which the action is brought, a lien upon the lands of the judgment debtor from the first day of the term of court at which the judgment is rendered, and parties dealing with real estate are charged with notice of pending suits against their grantor in the district courts to the county where the land is situate.

4. We do not decide whether the bank had notice of the existence of Ocobock's mortgage prior to the date it released Baker's lands from the lien of its judgment, because its cashier subscribed for and read the daily publication of the transactions occurring in the office of the register of deeds, but, for the purposes of this case, assume that it had such notice. For, if it be held that the taking and reading of this daily publication by the cashier of the bank was notice to the bank of the Ocobock mortgage, that fact would not entitle the appellant to be substituted or subrogated to the first lien of the bank against the property on which the appellant has a mortgage. This doctrine of subrogation or substitution does not flow from any fixed rule of law. It is applied by courts of equity to prevent a miscarriage of justice, and it is a familiar principle that "he who asks equity must do equity."

As already stated, Ocobock neglected to notify the bank that he had a lien upon the real estate on which the bank's judgment was a lien, which lien was subordinate to the bank's; and he neglected to notify the bank that he desired it to first exhaust the real estate of Baker upon which his mortgage was not

a lien before going upon the mortgaged property; nor did he notify the bank that it would be required or expected to exhaust the real estate upon which he, Ocobock, held no lien. Not having done this, the bank has not been guilty of any inequity toward Ocobock. How was the bank to know that Ocobock's debt was unpaid, or that the real ⁴⁵² estate pledged by the mortgage was not sufficient to satisfy Ocobock's debt as well as the bank's lien? Ocobock was a subsequent encumbrancer upon the real estate on which the bank had a lien. He was charged with notice of the existence of this judgment, and had he desired that the bank first exhaust the property of Baker, not encumbered by his mortgage, he should have notified that fact to the bank; and then had the bank, with a knowledge of the existence of Ocobock's mortgage, and with the knowledge in its possession that he required it to first exhaust the property of Baker not covered by the mortgage, released the lands from the lien of its judgment, Ocobock would be in a position here to invoke the doctrine of subrogation, or substitution, and have the bank's lien subrogated to the lien of his mortgage. But neither constructive notice nor actual knowledge on the part of the bank of the existence of Ocobock's mortgage was alone sufficient to postpone the bank's judgment lien to his mortgage, because the bank, in possession of such notice or knowledge, released certain lands of Baker's from the lien of its judgment. Ocobock being a subsequent encumbrancer, he was the party that the law required to be vigilant, and the bank was under no obligation to inquire of him as to the amount of his debt, the sufficiency of the security, nor whether he desired it to first exhaust its lien upon lands not covered by its mortgage, or whether he desired it not to release those lands from the lien of its judgment. Ocobock, by his laches, has forfeited the right to have the court apply to his case the doctrine of subrogation: *Clarke v. Bancroft*, 13 Iowa, 320; *Ross v. Duggan*, 5 Colo. 85; *Iglehart v. Crane*, 42 Ill. 261; *Hosmer v. Campbell*, 98 Ill. 572; *Taylor v. Maris*, 5 Rawle, 51.

The decree of the district court is affirmed.

JUDGMENT LIEN ATTACHES WHEN—PRIORITY.—The lien of a judgment deemed, under the statute, to have been entered on the first day of the term of the court at which it was recovered, begins with the first moment of the day on which it attaches, irrespective of the hour at which the entry was in fact made, and such lien overreaches deeds of trust or other encumbrances filed for record subsequent to such time, although the indorsement of the clerk shows that the judgment was, in fact, entered after such deeds or other

encumbrances were filed for record: *Hockman v. Hockman*, 93 Va. 855; 57 Am. St. Rep. 816, and note.

SUBROGATION—MARSHALING SECURITIES.—Subrogation is not founded upon contract, but is a creation of equity existing solely for accomplishing the ends of substantial justice: Note to *Musgrave v. Dickson*, 51 Am. St. Rep. 766. If a creditor, having a lien on two pieces of land, releases one of them, without any notice of the claim of another creditor, whose lien extends only to the other, the former is not to be prejudiced by his inability to subrogate the latter to his lien on the property which has been released: *Cheesebrough v. Millard*, 1 John. Ch. 409; 7 Am. Dec. 494. Compare *Terry v. Woods*, 6 Smedes & M. 139; 45 Am. Dec. 274; *Blakemore v. Wise*, 95 Va. 269; 64 Am. St. Rep. 781.

MORTGAGES AND DEEDS—CONSTRUCTIVE NOTICE.—THE REGISTRY LAW applies only in cases where the interest of a subsequent judgment creditor, mortgagee, or purchaser, at the time he acts, can be affected by want of notice of the unregistered mortgage. It was not intended to relate to those who have no concern in such mortgage when they acquire their rights: *Voorhis v. Westervelt*, 43 N. J. Eq. 642; 3 Am. St. Rep. 315, and note. The record of a deed is constructive notice only as against subsequent purchasers and encumbrancers: Note to *Woodward v. Brown*, 63 Am. St. Rep. 181.

CODDING v. MUNSON.

[52 NEBRASKA, 580.]

AGENCY—NONEXISTENT PRINCIPAL—AGENTS LIABILITY.—It is a general rule that one who assumes to act as agent for a principal who has no legal status or existence renders himself individually liable on contracts so made; but this rule is founded upon the presumption that the parties intended to create an enforceable obligation, and does not obtain when it appears, either by express agreement or from the circumstances, that the agent is not to be charged.

AGENCY—NONEXISTENT PRINCIPAL—PLEADING—INSTRUCTIONS.—If a petition declares solely on a contract made directly with the defendant, and a promise by him to pay, the jury should be instructed, where the defendant claims to be an agent for a principal having no legal status, that the defendant is liable, unless the agreement was, that the plaintiff was to look to another to perform its obligation, and it is error to submit to them the theory that the defendant was agent for another and had received from his principal money to the use of the plaintiff.

F. C. Power and S. H. Sedgwick, for the plaintiff in error.

Gilbert Brothers, for the defendant in error.

⁵⁸¹ IRVINE, C. Munson sued Coddington, alleging that he had sold and conveyed to him certain land for the price of ten thousand dollars, that nine thousand seven hundred and fifty dollars thereof had been paid, and praying judgment for the remaining two hundred and fifty dollars. The answer was a general denial. ⁵⁸² The plaintiff recovered and the defendant brings the case here by petition in error.

The evidence discloses that there were held several open meetings of citizens of York for the purpose of securing the location there of an institution for the care of orphans, under the patronage of the Woman's Home Missionary Society of the Methodist Episcopal Church. It was understood that a gift of about ten thousand dollars would be necessary to accomplish the purpose. Both plaintiff and defendant attended the meetings and contributed to the undertaking. It was determined that the donations should be in the form of negotiable promissory notes, made to the order of a trustee to be designated for that purpose. A committee appointed at one of the meetings, under power possessed or assumed by it, designated the defendant Coddington as trustee. It would seem that the institution was formally located at York, but instead of giving the notes or their proceeds to the society, the land of plaintiff was purchased and conveyed to "Anson B. Coddington, Trustee," he in turn conveying to the Missionary Society. Coddington indorsed without recourse a number of subscription notes to Munson, and these notes, together with other items accepted by Munson, made up the sum of nine thousand seven hundred and fifty dollars which Munson admits receiving. It is not contended that the price was other than claimed, or that the remainder was paid. The only question is as to Coddington's personal liability therefor. So far as has been stated, the evidence is quite clear and free from conflict. As to the extent of Coddington's authority, if he possessed any, and the nature of the transactions between him or other citizens of York on the one side and Munson on the other, with reference to the purchase, the evidence is exceedingly vague and leaves much to inference, if not to conjecture. Still, it is upon the last question that the case must be made chiefly to turn.

It is the general rule that one who assumes to act as agent for a principal who has no legal status or existence renders himself individually liable on contracts so made: *Learn v. Upstill*, 52 Neb. 271. This doctrine receives ⁵⁸³ its most frequent application in cases like the present, where a person or committee incurs obligations as the result of instructions given by a body gathered together informally for a special purpose, and possessing no definite membership or continued power of existence. The rule is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation of a legal obligation capable of enforcement, and that, therefore, it is understood that the obligation shall rest on the in-

dividuals who actively participate in the making of the contract, because of the difficulty in all cases, the impossibility in many, of fixing it upon the persons taking part in or submitting to the action of the evanescent assemblage. If, however, the person with whom the contract is made expressly agrees to look to another source for the performance of its obligations, or if the circumstances be such as to disclose an intention not to charge the agent, as where the other agrees to accept the proceeds of a particular fund, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts. This qualification of the general rule is clearly indicated in *Learn v. Upstill*, 52 Neb. 271; and is recognized by nearly all the cases discussing the general subject: See cases cited by Judge Norval in *Learn v. Upstill*, 52 Neb. 271; also *Heath v. Goslin*, 80 Mo. 310; 50 Am. Rep. 505; *Button v. Winslow*, 53 Vt. 430; *Comfort v. Graham*, 87 Iowa, 295.

Applying these principles to the case at bar, the evidence would raise *prima facie* the presumption upon which the general rule is based. On the other hand, it was sufficient to justify the inference that the plaintiff did not look to defendant personally, but was to receive merely the subscription notes or their proceeds. The instructions should have stated the law as we have indicated it, and submitted to the jury the issues bearing thereon. Instead thereof, the court charged as follows: "If you find from the evidence that Coddington was in this ⁵⁸⁴ transaction only agent and trustee for the Mothers' Jewels Home, and that all his transactions as such agent and trustee have been performed in good faith, then you should find for the defendant." This was erroneous, because it made Coddington's release from liability depend upon his action as agent for the Home, and his performing his duty in good faith. It was not claimed that he was agent for the Home, but for the citizens of York. This principle having no legal status, the instruction should have been that Coddington was liable unless the agreement was that Munson was to look solely to the subscriptions. The error was prejudicial to the defendant, because there was no evidence of an agency such as the instruction submitted, and a verdict for plaintiff was therefore required without regard to that phase of the evidence which, if properly submitted, might have induced a different finding.

The court also charged as follows: "If you find from the evidence that Coddington, defendant, has sufficient funds in his hands of the Mothers' Jewels Home, or that there was placed

in his hands sufficient funds to pay Munson in full for his lands, then you should find for the plaintiff." While some evidence of that character appeared over defendant's objection, it was not relevant to the issues and should not have been submitted to the jury. The petition was not framed on the theory that Munson had sold to third parties, and that Coddington had received from them moneys to his use. It declared solely on a contract direct with Coddington and a promise by him to pay.

It is contended by plaintiff that the contract was made by Coddington in his own name, that he thereby made himself liable, and the judgment should for that reason be affirmed. No doubt a contract for the sale of land, if made by an agent in his own name, will bind him personally, even though he describe himself therein as agent and disclose his principal: *Morgan v. Bergen*, 3 Neb. 209. But in this case we have no contract so made. Although ⁵⁸⁵ the addition of the word "trustee," in the deed to Coddington, be *designatio personae* merely, still that deed is not the contract sued upon. It does not follow that the grantee named in a deed is liable for the purchase money.

Reversed and remanded.

AGENCY—LIABILITY OF AGENT ON CONTRACTS.—An agent who contracts in his own name, and fails to disclose his principal's name, is personally liable on the obligation: *Argersinger v. Macnaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687; *Baldwin v. Leonard*, 39 Vt. 260; 94 Am. Dec. 324. He is personally liable on contracts which show an intention to bind himself personally: *Note to Anderson v. Timberlake*, 62 Am. St. Rep. 110. The members of a voluntary association for educational purposes have been held liable for the wages of a teacher hired by the acting president of the association: *Heath v. Goslin*, 80 Mo. 310; 50 Am. Rep. 505.

AGENCY—PRINCIPAL HAVING NO LEGAL EXISTENCE—LIABILITY OF AGENT.—In *Learn v. Upstill*, 52 Neb. 271, it was held that one who, as agent, assumes to represent a principal who has no legal existence or status, is himself answerable. In that case, Upstill sued Learn and others to recover for labor performed and materials furnished by the plaintiff in the opening and improvement of a highway. The plaintiff obtained a judgment. The petition alleged that the defendants were appointed a committee by a public meeting of citizens of Long Pine, Nebraska, to cause the said public highway to be opened and improved; that the defendants pledged their own individual responsibility; and that the credit was given to them personally and not to their irresponsible principal. This being true, the court held that the defendants were the agents of a principal which had no legal existence or responsibility, and that a cause of action was stated against them.

In support of this view the court quoted from two cases, as follows: "In *Eichbaum v. Irons*, 6 Watts. & S. 67, 40 Am. Dec. 540, the members of a committee appointed by a political meeting for that purpose ordered a free public dinner for the party, and it was held that the members were personally liable. Chief Justice Gibson, in delivering the opinion of the court, observed: 'Now it will

not be pretended that nobody was responsible to the plaintiff for the order; and if the defendants were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be, whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence; not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or to furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass. . . . In a case like this, the usual presumption of credit is inverted; and, in the absence of evidence to the contrary, the vendor is supposed to have relied on the responsibility of the persons who gave the order.' In *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436, the court, in construing a case with somewhat analogous facts, use this language: 'But it is said these defendants did not contract. They certainly represented that they had a principal for whom they had authority to contract. They, for or on behalf of an alleged principal, contracted that such principal would do and perform certain things. As we have said, there is no principal, and it seems to us that the defendants should be held liable, and that it is immaterial whether they be so held, because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence.' The same doctrine, it was said, is recognized in *Mechem on Agency*, sec. 557; *Blakely v. Bennecker*, 59 Mo. 193; *Steele v. McElroy*, 1 Sneed, 341; *Winona Lumber Co. v. Church*, 6 S. Dak. 498, and cases cited. *Lindsey v. Heaton*, 27 Neb. 662, was also referred to.

With respect to *Learn v. Upstill* 52 Neb. 271, the court said: "There was evidence before the jury tending to sustain the averments of the petition, and that credit alone was given by plaintiff to the defendants, and also testimony from which the inference might be drawn that the defendants did not undertake to be bound beyond the amount which should be collected from the citizens of Long Pine. The evidence, while conflicting, was sufficient to sustain the averments of the petition as to all the defendants, excepting Mr. Kyner. Upstill testified substantially that Learn claimed authority to represent Kyner, but the court said that agency cannot be proved by the declaration of one assuming to act as agent: *Burke v. Frye*, 44 Neb. 223.

Every issue for the jury to pass upon was eliminated from the case except the single one whether the defendants were liable upon the contract. Hence, the court said that, if the jury found by the evidence that they were so bound, the plaintiff was entitled to a verdict for the full amount claimed, and nothing less.

Complaint was made of the giving of the following instruction: "2. You are instructed that the burden of proof in this case rests upon the plaintiff, to prove, by a preponderance of the evidence, all the material allegations of his petition. The material allegations in this case are: 1. The employment of the plaintiff by the defendants, or one or more of them as a committee, or as individuals, to do the work and furnish the materials as charged in the petition; 2. The doing of the work and furnishing of the materials by the plaintiff in pursuance of the employment; 3. The reasonableness and fairness of the prices charged for the work and materials, about

which in this case there is no dispute, the defendants having admitted these facts; and 4. The amount remaining due and unpaid for the work and material."

It was argued that this instruction was erroneous, in that it omitted to submit to the jury the following material issues: Whether the defendants acted in a representative capacity in making the contract, and did they guarantee the pay? But the court said that the petition tendered no such issue, and that the action was not upon a contract of guaranty, but an original promise. It was also argued that the instruction was faulty because it implied that the employment by one of the defendants would bind them all. This was said to be "an unfair criticism of the language." "The fact," said the court, "that the jury were told that one of the material issues was whether the contract was made by the defendant or one or more of them, did not authorize a finding against all of the defendants if the evidence showed the contract was made by one of them alone. The jury must have so understood the instruction, when considered in connection with the fifth paragraph of the charge, which was in the language following: 'If the jury believe from all the evidence that any one, or more, of the defendants promised the plaintiff that they would be individually responsible to plaintiff for the payment of the work and materials sued for, and that, relying upon such individual promise, or guaranty, the plaintiff performed the work and furnished the material, as set out in the petition, and if the jury should find such individual promise to be established by a preponderance of all the evidence on that subject, then you might find for the plaintiff against the one, or more, of said defendants, whom you should find made such promise, if you find any such promise or guaranty was made.' The rule is, that instructions are to be construed together and not separately, and if, when so considered, the issues are fairly submitted, it will suffice. Applying this principle to the second and fifth paragraphs of this charge, it was made plain to the jury that a recovery could be had against such of the defendants alone as the evidence disclosed made the contract with the plaintiff. No inference can be fairly drawn from the instructions that if one of the defendants was bound, all of them were likewise liable."

It was also insisted that the eighth instruction was misleading, but the court did not think so. "It is made clear if the defendants only promised to be responsible for the sum collected from the citizens on the subscription lists, then the defendants were entitled to the verdict. The instructions, as a whole, were eminently fair. The judgment as to Kyner is reversed, and affirmed as to the other defendants."

WELLS v. STECKELBERG.

[52 NEBRASKA, 597.]

EJECTMENT—PLEADING AND PROOF—RECOVERY.—Ejectment is a possessory action, and to recover, the plaintiff must plead, and, under the general issue must prove, not only a legal estate in himself, but a present right of possession. Unless both facts are established the defendant prevails.

ESTOPPEL BY DEED—VOID CONVEYANCE.—If one assumes, in a representative capacity, to sell and convey to another the entire estate in land, he is estopped from setting up an estate therein in his own right, against the purchaser, although the sale and deed made by the vendor were void.

ESTOPPEL BY DEED—QUITCLAIM—EJECTMENT.—If it is shown that a mother died intestate, seised of land in which her husband took an estate for life, as tenant by the curtesy, and her infant son the remainder in fee; that the father petitioned for a license to sell the land, and, by averring that it was the son's and alleging other facts from which an estate in fee in possession was inferable, and by falsely alleging that he had been appointed guardian of the son, obtained such license; that he made a sale under the license, reciting in the deed that he was guardian and reciting all of the proceedings in such manner as to make them appear valid; that the deed purported to convey the whole estate, including the father's right; that the father thereafter executed to the son a deed of quitclaim; and that the son, on reaching his majority, and during the father's lifetime, brought ejectment against the purchaser at the guardian's sale, claiming that such sale was void; the father, and those claiming under him, are estopped from setting up his life estate against such purchaser, and the action must therefore fail.

ESTOPPEL BY DEED—COVENANTS ARE UNNECESSARY.—Covenants of warranty or of title are unnecessary to create an estoppel by deed.

Ejectment. It appears from the opinion in the former action referred to in the principal case that before J. S. Wells attained his majority he notified Steckelberg that he repudiated the entire transaction by which the latter claimed title, and that his subsequent conduct and acts were consistent with this, his declared purpose.

George G. Bowman, Albert & Reeder, and J. A. Ehrhardt, for the plaintiff in error.

W. W. Young, and Allen, Robinson & Reed, for the defendant in error.

598 IRVINE, C. This case is before us on rehearing. The former opinion (Wells v. Steckelberg, 50 Neb. 670), contains a statement of the facts, which, with one or two incidental additions, is sufficient for the purposes of the present inquiry. The former decision was based on the proposition that inasmuch as plaintiff's father, John B. Wells, had never been appointed guardian of the plaintiff, there was no jurisdiction in the district court of Platte county to grant him a license to sell the infant's land. Our attention is now for the first time called to certain facts which render a re-examination of that question at present unnecessary. On the death of plaintiff's mother the law did not cast the descent immediately in plaintiff. He then took an estate in remainder, his father acquiring an estate for life as tenant by the curtesy. Ejectment is a possessory action. In order to recover, the plaintiff must plead, and under the general issue must prove, not only a legal estate in himself, but

a present right of possession. Unless both facts are established, the defendant prevails: Code Civ. Proc., secs. 626, 627; Dale v. Hunneman, 12 Neb. 221; Staley v. Housel, 35 Neb. 160; Wanser v. Lucas, 44 Neb. 759; George v. McCullough, 48 Neb. 680. It is therefore apparent that plaintiff could not prevail in this case, although the guardian's sale were absolutely void, unless either the father's life estate had determined or had in some way passed to the plaintiff. It had not determined by the death of the life-tenant; but, in order to show that it had passed to the plaintiff, there was introduced in evidence a deed of quitclaim from John B. Wells to Joseph S. Wells, bearing date August 31, 1891. This operated merely to pass such estate as remained in the father at that time. Had he then any title or right which could be asserted against the defendant?

Recurring now to the proceedings and sale through ~~509~~ which the defendant claims title, it is found that, in the petition for license to sell, John B. Wells not only describes himself as the guardian of Joseph S. Wells, duly appointed by the probate court of Platte county, but he alleges and swears that Joseph S. Wells is the owner of the land, together with other land likewise inherited from the mother. Nothing is said about there being a particular estate in himself, but on the contrary there are allegations concerning rents and their application from which it is directly inferable that the minor's estate was one in fee simple in possession. The facts from which John B. Wells' estate by the curtesy arose are not alleged, nor does the fact appear that the ostensible guardian was also the father of the minor. There is nothing in the record to notify defendant that there was a life estate outstanding. On the other hand, the conduct of the tenant of that estate was such as to induce the belief that there was not. On this petition a license was obtained directing the sale of the land, not of an expectancy therein. The report showed that the land was sold. Finally John B. Wells conveyed it to defendant—apparently the fee, certainly not merely the interest of Joseph S. Wells, unless every guardian's deed is to be given that limited effect. The form and contents of this deed require notice. It opens as follows: "This indenture, made this third day of December, A. D. 1883, between John B. Wells as guardian of Joseph S. Wells, a minor, duly appointed by the probate court of Platte county, state of Nebraska, party of the first part, and Henry Steckelberg, of Madison county, said state, party of the second part." Then follow recitals of all proceedings, from which they appear valid and

regular. The granting part of the deed is as follows: "Now, this indenture witnesseth, that the said John B. Wells, guardian as aforesaid, by virtue of the premises and in consideration of the said sum of three thousand and forty dollars, to him paid by the said Henry Steckelberg, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by ⁶⁰⁰ these presents does grant, bargain, sell, and convey, unto the said Henry Steckelberg, and to his heirs and assigns forever, the said land [describing it], together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever of the said party of the first part of, in, and to the same, or any part thereof." The deed closes with a covenant that Wells "took the oath and gave the bond by law required, and gave public notice of said sale as above set forth, and in all things observed the requirements of the law and of said orders in said sale." Note that the deed recites that John B. Wells was the duly appointed guardian; that it purports to convey the fee, without reserving or excepting any particular estate; that to the grant of the ward's estate is added an express grant of the title of the "party of the first part," a clause which can be given no independent effect unless as conveying John B. Wells' title, and that it closes with a covenant that all the requirements of the law have been observed.

We are of opinion that under the circumstances John B. Wells was estopped, both by deed and in pais, from setting up his own life estate against the defendant, and that the estoppel continued as against his grantee by quitclaim. There is in the deed no covenant of title or of warranty, but to create such an estoppel covenants seem unnecessary. As said by the supreme court of the United States, reviewing the authorities and enforcing an estoppel under somewhat similar facts: "If a deed bears on its face evidence that the grantors intended to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantors and those claiming under them, in ⁶⁰¹ respect to the estate thus described, as if a formal covenant to that effect had been inserted": *Van Renssalaer v. Kearney*, 11 How. 297.

That an estoppel arises against the assertion of a right in one-

self by reason of a conveyance made in a representative capacity, see *Poor v. Robinson*, 10 Mass. 131. In that case a release was made by executors purporting to act under a power in the will. The power did not in fact extend to the estate in question, and the court held that the release was void. But it happened that the executors were also heirs, and the court further held that as such they were estopped from setting up title as against the release they had made as executors: See, also, *Little v. Giles*, 25 Neb. 313. The present right of the plaintiff depends not on his inheritance of the remainder, but on his father's conveyance to him of his life estate. This the father and those claiming under him are estopped from setting up as against the prior conveyance by the father to the defendant. It follows that the judgment of the district court is affirmed.

Post, C. J., not sitting.

EJECTMENT.—TO RECOVER IN EJECTMENT, the legal title and right of possession must be shown to be in the plaintiff: *Rowe v. Beckett*, 30 Ind. 154; 95 Am. Dec. 676; *Barrett v. Hinckley*, 124 Ill. 32; 7 Am. St. Rep. 331; *Allen v. Higgins*, 9 Wash. 446; 43 Am. St. Rep. 847, and note.

ESTOPPEL BY DEED—RECITALS.—A party who has no title to, or interest in, lands may, by his deed, estop himself from afterward questioning the validity of his title, or denying that he had authority to convey the fee: *Mankato v. Willard*, 13 Minn. 1; 97 Am. Dec. 208. So a party who has admitted a fact in his deed is estopped, not only from disputing the deed, but every fact which it recites, and so are all persons claiming under and through him: *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99. A conveyance estops the grantor from denying that he had any title at the time thereof: *Comstock v. Smith*, 13 Pick. 116; 23 Am. Dec. 670. Covenants do not work an estoppel unless the deed itself is a valid instrument: *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681.

HYDE v. MICHELSON.

[52 NEBRASKA, 680.]

JUDGMENT—ENTRY NUNC PRO TUNC—TIME—NOTION. A court is invested with authority to make its records disclose what actually transpired. Hence, if, in any proceeding pending in a court, a judgment is actually pronounced or an order actually made, and if, for any reason, such judgment or order is not recorded, then, at any time afterward, upon proper notice being given to the parties interested and the facts being established that such judgment was pronounced or such order made, the court may cause such order or judgment to be spread upon its records as of the date it was pronounced or made.

JUDGMENT—ENTRY NUNC PRO TUNC—TIME.—A code section providing that an action to vacate or modify a judgment rendered must be brought within three years after such judgment is pronounced has no application to a proceeding brought to obtain a nunc pro tunc entry of a judgment, and such entry may, there-

fore, be made more than three years after the actual rendition of the judgment.

JUDGMENT—ENTRY NUNC PRO TUNC—RIGHTS OF THIRD PARTIES.—A party to an action cannot prevent the court from entering, nunc pro tunc, the judgment pronounced by it, by showing that a third person, not a party to the action, has acquired an interest in the property involved in the litigation since the rendition of the judgment. The rights of such third person, where he is not before the court, are not adjudicated in the nunc pro tunc proceeding.

John Lothrop, for the plaintiffs in error.

Davis & Howell, and E. R. Duffie, for the defendant in error.

⁶⁸¹ RAGAN, C. On September 15, 1890, in the district court of Washington county, an action came on for trial wherein Anton Michelson was plaintiff and Samuel Hyde, Welcome Hyde, John Lothrop, and Hortense Lothrop were defendants. It appears that Michelson, in his petition in that action, alleged that Welcome Hyde was, on December 8, 1857, the owner of certain real estate in controversy in the case; that on said date the said Welcome Hyde attempted to constitute the said Samuel Hyde his attorney in fact to sell and convey said real estate, but that the power of attorney was, in some manner not disclosed by the record, defective; that Samuel Hyde as such attorney in fact had, however, sold and conveyed, or attempted to convey, the real estate to Michelson; that subsequently Welcome Hyde and wife, by quitclaim deed, conveyed the premises in controversy to the defendant John Lothrop, who entered into possession thereof. It seems that Michelson in his petition prayed that the quitclaim deed from Welcome Hyde to the Lothrops might be set aside; that the said Welcome Hyde might be ordered to execute and deliver to the said Samuel Hyde a valid power of attorney authorizing the latter to sell and convey the real estate in controversy, and that, in default of his doing so within twenty days, the court should enter a decree reforming said power of attorney; and Michelson also prayed that the title to the real estate in controversy might be quieted and confirmed in him. It seems that neither Samuel Hyde nor Welcome Hyde appeared at any time during the pendency of the action, but the Lothrops appeared and defendant the same. The judgment or decree entered by the district court in the case is not in the record. On February 23, 1894, Michelson moved the district court to enter a judgment, ⁶⁸² as of the date of September 15, 1890, dismissing his petition in said case in so far as it related to his prayer that his title to the real estate described therein

might be quieted and confirmed in him. Due notice of this application was served upon the Lothrop's, and they appeared and resisted the motion. The district court found—and the evidence sustains the finding—that at the time of the trial of the action in September, 1890, and before its final submission, Michelson in open court dismissed that part of his petition which prayed that the title to the real estate in controversy might be quieted and confirmed in him; that the court allowed such dismissal to be made and announced that it would be so entered upon the records, but such dismissal was not so entered. Whether, in the decree rendered in the action at that time and journalized, anything was said in reference to quieting and confirming in Michelson the title to the real estate in controversy, we have no means of knowing, since, as already stated, the decree actually journalized at that time is not in the record. The district court in February, 1894, sustained the motion of Michelson for the entry *nunc pro tunc* of the decree dismissing his action in relation to the matter already mentioned, and this order Lothrop brings here for review on error.

1. It is not an open question in this state that the district courts thereof are invested with authority to make their records disclose what actually transpired. If, in any proceeding pending in a court, a judgment is actually pronounced or an order actually made, and if, for any reason, such judgment or order is not recorded, then, at any time afterward, upon proper notice being given to the parties interested and the facts being established that such judgment was pronounced or such order made, the court may cause such order or judgment to be spread upon its records as of the date it was pronounced or made: *Van Etten v. Test*, 49 Neb. 725, and cases there cited.

688 2. The *nunc pro tunc* entry of the judgment in the case at bar was made more than three years after the actual rendition of the judgment; and it is insisted by counsel for plaintiff in error that the court was without jurisdiction to make this entry, by reason of this lapse of time. This contention of counsel is based upon their construction of section 609 of the Code of Civil Procedure. This section provides that a proceeding to vacate or modify a judgment on account of the mistake, neglect, or omission of the clerk, or irregularity in obtaining such judgment, shall be brought within three years after such judgment is pronounced. But this is not an action to vacate or modify a judgment rendered. It is a proceeding to have spread upon the records a judgment which was in fact rendered but not re-

corded, and section 609 has no application to such a proceeding as this.

3. It appears, from the evidence introduced on the hearing of the motion for the nunc pro tunc entry of the judgment, that since the final decree was rendered in the case the Lothrop's have conveyed the real estate in the controversy to a man named Gustin; and the argument is here made that it was error for the court to make the nunc pro tunc order, since it affected the rights of third parties to the property affected thereby. The answer to this contention is, that Gustin is not a party to this suit nor a party to this application for the nunc pro tunc order. He has not intervened either in the action or in this proceeding and asked for the protection of the court. The Lothrop's cannot prevent the court from having spread upon its records the judgment actually rendered in the suit to which they were defendants by insisting upon any rights which Gustin may have acquired to the property. In other words, Gustin is not before the court, and his rights, if he have any, are not adjudicated in this proceeding. The judgment of the district court is affirmed.

JUDGMENT—ENTRY NUNC PRO TUNC.—If the clerk fails to record a decree, the court may afterward, if no rights of third parties have intervened, or will be affected thereby, require the clerk to record the decree nunc pro tunc, irrespective of the question whether the proceedings in the case were regular or irregular, valid or invalid: *Day v. Goodwin*, 104 Iowa, 374; 65 Am. St. Rep. 465. Compare *Ninde v. Clark*, 62 Mich. 124; 4 Am. St. Rep. 823, and monographic note thereto, on the nunc pro tunc entry of judgments, where the rights of third persons are considered.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

HIGGINS v. WESTERN UNION TELEGRAPH COMPANY.

[156 NEW YORK, 75.]

MASTER AND SERVANT.—THE NEGLIGENCE OF A SERVANT WHEN NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT is not attributable to his master.

MASTER AND SERVANT.—THE DOCTRINE OF RESPONDEAT SUPERIOR APPLIES ONLY when the relation of master and servant exists in respect to the very transaction in question. Hence, it is not necessarily inferable respecting a transaction from the fact that one person is in the alleged employment of another. Servants who are employed and paid by one person may, nevertheless, be ad hoc the servants of another in the particular transaction, and that, too, when their original employer is interested in the work.

MASTER AND SERVANT—RELATION OF RESPONDEAT SUPERIOR—WHEN DOES NOT EXIST BETWEEN.—If a contractor engaged in repairing a building, in which there is an elevator, calls upon an employé of the owner of the building, whose general duty it is to manage and operate such elevator, to assist him in doing the work of such contractor by using such elevator as a movable platform, an employé of the contractor, working upon such elevator and using it as such platform, and injured by the negligence of such employé of the owner of the building in managing such elevator, cannot recover of such owner therefor, because at the time such employé is not engaged in the work of his employer, but in that of such contractor.

MASTER AND SERVANT.—WHEN A SERVANT OF ONE PERSON IS LOANED TO ANOTHER, or, for any reason, undertakes to do work for another, he becomes the servant of that other, and his master is not answerable for his negligence while so in the service of the other.

Action to recover damages for injuries claimed to have been received from the negligence of the defendant. Verdict and judgment in favor of the plaintiff, and the defendant appealed.

Jacob F. Miller, George H. Fearons, and Rush Taggart, for the appellant.

Chauncey S. Truax, for the respondent.

⁷⁶ O'BRIEN, J. The plaintiff sustained a personal injury on the seventh day of December, 1891, while engaged in using the elevator in defendant's building at the corner of Broadway and Dey street in the city of New York. The negligent act to which the injury is to be attributed was committed by a general servant of the defendant, whose duty it was to manage and operate the elevator.

The question in this case is, whether the defendant is responsible under the doctrine of respondeat superior for the negligence of its servant under the circumstances of the case. There is practically no dispute with respect to the facts, and, briefly stated, they are these: It seems that some months before the accident the building referred to was injured by fire, and the company entered into a contract with a contractor and builder to restore the building. The contractor, among other things, was to furnish elevators, and they had been ⁷⁷ placed in the building some time before the accident. The builder had not, however, yet completed his contract, and had not turned over the elevators to the defendant. They were still, for all practical purposes, the property of the contractor. From the time he first placed them in the building they were subject to his use in carrying materials and workmen from the lower to the upper floors. There can be no doubt that he had the right to use them for that purpose until such time as he should complete his contract and turn the building over to the defendant.

On the day of the accident, the plaintiff, a mason or plasterer, was in the service of the contractor, and was directed by him to do some plastering in the elevator shaft. For the purpose of doing this work they used the elevator as a platform, upon which the plaintiff stood. It was necessary to move the elevator up and down to enable the plaintiff to do his work, and the contractor, instead of employing one of his own men for that purpose, found it more convenient and economical to procure a man who was in the employment of the defendant. It should be stated that, although the elevators had not yet been turned over to the defendant, it was, nevertheless, permitted to use them for the purpose of taking passengers up and down during some portions of the day. On the day of the accident, the defendant's ser-

vant, who had charge of the elevator for the purpose of carrying passengers, suspended that work about noon, and the contractor, during the rest of the day, used the elevator as a platform for the purpose stated.

There is no question in this case with respect to the fact that Algar, the person who took charge of the elevator, and whose negligence caused the accident, was in the general service and pay of the defendant; but the question is whether, at the time of the accident, he was engaged in doing the defendant's work or the work of the contractor. The work of plastering the elevator shaft was that of the contractor. Algar, who was called upon by the contractor to move the elevator while the plaintiff was standing upon it, was not at the ⁷⁸ time taking any orders from the defendant. His orders came from the plaintiff, who was in the employ of the contractor, and who directed him to move the elevator up and down, as it became necessary, to enable him to do the work. The hand of Algar that moved the lever which controlled the elevator was directed by the mind and brain of the plaintiff. To hold the elevator steady it was necessary to bring the lever to the center of the guard and put it in a catch. To move the elevator up or down the lever was taken from the catch and moved forward or backward accordingly. On the occasion of the accident, Algar did not put the lever in the catch, and did not have his hand upon the lever, but was sitting in a chair reading a newspaper. It was this negligence which caused the accident, since, without any instructions from the plaintiff to move the car, and without warning, it started up, throwing him down, with his head between the door and the top of the elevator, inflicting injuries of a somewhat serious character.

The general rule is, that a party injured by the negligence of another must seek his remedy against the person who caused the injury, and that such person alone is liable. The case of master and servant is an exception to the rule, and the negligence of the servant, while acting within the scope of his employment, is imputable to the master: *Engel v. Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692. But the doctrine of *respondet superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong, at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced was, at the time, in the general em-

ployment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may, nevertheless, be ad hoc the servants of another in a particular transaction,⁷⁹ and that, too, when their general employer is interested in the work: *Wyllie v. Palmer*, 137 N. Y. 248.

In this case, as already observed, the contractor had the right to use the elevator, and for that purpose could have employed his own servants. Instead of doing so, he borrowed the defendant's servant, who, for the time being, became the servant of the contractor, engaged in doing his work and subject to his order. He put the elevator and the conductor to a use different from that employed by the defendant. The defendant used the elevator for the purpose of carrying passengers. The contractor was using it as a platform upon which the plaintiff might stand in doing his work. Now, does the fact that Algar, who was guilty of the negligent act that produced the injury, was in the general employ and pay of the defendant, make it liable for the result of this accident? I think not, and for the reason that the conductor, while moving the elevator up and down as directed by the plaintiff, was not engaged in the defendant's work, but in the work of the contractor.

This distinction in the law of master and servant is made quite clear by the decisions in this court: *Wyllie v. Palmer*, 137 N. Y. 248; *McInerney v. Delaware etc. Co.*, 151 N. Y. 411.

Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master. And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is not to be attributed to the master. Here the relation of master and servant between the conductor of the elevator and the defendant was suspended during the time that he was doing the work of the contractor in moving the plaintiff up and down in the shaft.

I am unable to distinguish this case in principle from the cases in this court already cited; and the best-considered cases in other jurisdictions are to the same effect: *Murray v. Currie*,⁸⁰ L. R. 6 Com. P. 26; *Rourke v. White Moss Colliery Co.*, L. R.

2 Com. P. Div. 205. In the latter case Lord Cockburn stated the rule in these words: "But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

The true test in such cases is to ascertain who directs the movements of the person committing the injury. It seems to me that the conductor in this case, whose negligence caused the injury, was not, at the time, engaged in the defendant's work, but in the work of the contractor, under the direction of the plaintiff. Hence, the decision in this case cannot be sustained without disturbing the rule of law as determined in the cases cited.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur (Parker, C. J., and Martin, J., in result), except Gray and Vann, JJ., not sitting.

MASTER AND SERVANT—ACTS OF SERVANT OUTSIDE THE SCOPE OF HIS EMPLOYMENT.—A master is not liable for the negligent act of his servant or agent, if the latter, in performing the act from which the injury resulted, was not acting in the course of his employment: See monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 73; *Brown v. Jarvis Engineering Co.*, 166 Mass. 75; 55 Am. St. Rep. 382.

MASTER AND SERVANT—RESPONDEAT SUPERIOR.—A master is not liable for every wrong which the servant may commit during the continuance of the employment. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, the latter is not liable. If the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is, for the time, suspended: See monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 72, 73, on acts of a servant for which his master is not liable.

MASTER AND SERVANT—ACTS OF SERVANT TEMPORARILY UNDER DIRECTION OF THIRD PERSON.—The fact that one is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another who may become liable for his acts. If he was performing a special service for an independent contractor, he will be, as to that particular service, the servant of him for whom such service was performed, although he may be the general servant of another: *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925. See *Stone v. Hills*, 45 Conn. 44; 29 Am. Rep. 635; *Brown v. Smith*, 86 Ga. 274; 22 Am. St. Rep. 456, and monographic note.

BERG v. PARSONS.

[156 NEW YORK, 109.]

FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR HIS EMPLOYER IS NOT ANSWERABLE, though the work which he is engaged to do is of a character which, if not carefully done, will probably inflict damage upon others, as where he is to blast rock adjacent to the premises or building of another, but the work contracted to be done is lawful, does not constitute a public nuisance, and there is no statute binding the employer to efficiently perform it.

Action to recover for damages claimed to have been inflicted upon the property of the plaintiff in the city of New York by negligently blasting on the adjacent premises. The defense was, that the work was done by an independent contractor over whom the defendant neither had nor assumed any control. Judgment for the plaintiff, and the defendant appealed.

Alex. Thain, for the appellant.

Charles W. Pierson, for the respondent.

112 MARTIN, J. The doctrine of respondeat superior is based upon the relation of master and servant or principal and agent. As no such relation existed between the parties, I find no ground upon which the judgment in this action can be sustained.

The rule that where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence or that of his servants, is well established by the authorities **113** in this state: *Blake v. Ferris*, 5 N. Y. 48; 55 Am. Dec. 304; *Pack v. Mayor etc.*, 8 N. Y. 222; *Kelly v. Mayor etc.*, 11 N. Y. 432; *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267; *King v. New York Cent. etc. R. R. Co.*, 66 N. Y. 181; 23 Am. Rep. 37; *Pierrepont v. Loveless*, 72 N. Y. 211; *Ferguson v. Hubbell*, 97 N. Y. 507; 49 Am. Rep. 544; *Herrington v. Lansingburgh*, 110 N. Y. 145; 6 Am. St. Rep. 348; *Roemer v. Striker*, 142 N. Y. 134.

In *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, the defendant had a license to construct, at his own expense, a sewer in a public street. He engaged another person to construct it for a stipulated price. The sewer was left at night in a negligent manner by the workmen who were employed in its construction. It was held that the immediate employer of the servant, through

whose negligence the injury occurred, was responsible, but that the primary principal or employer was not.

In *Pack v. Mayor etc.*, 8 N. Y. 222, which was an action for damages caused by the alleged negligence of a contractor in blasting rocks, which resulted in injury to the plaintiff's house, in personal injury to his wife, and in killing one of his children, it was held that, as the work was being prosecuted under a contract with a person who was to perform it, the corporation was not liable, but that a recovery for such an injury could be had only against the person actually guilty of the wrongful act, or against one to whom he stands in the relation of servant or agent, and that the contractor in such a case was not the servant or agent of the corporation.

The Kelly case was also an action for damages occasioned by negligence in blasting. In that case, there was a contract between the city and a contractor to grade a certain street, and it was held that the city was not liable for damages occasioned by negligence in the performance of the work, but that the contractor was alone liable, although the contract provided that the work should be done under the direction and to the satisfaction of the officers of the corporation.

The McCafferty case was for an injury to the plaintiff's store and property by alleged negligence in blasting rocks necessary for the construction of the defendant's road. There ¹¹⁴ the corporation had let the work of constructing the road by contract, and the negligence was that of the contractor or his employés, and this court held that the defendant was not liable, and that there was no distinction between real and personal property, so far as its negligent use and management were concerned, or of negligent acts upon it by others.

In the King case, the owner of real property was held not liable for injuries resulting from negligence on the part of a contractor or his employés engaged in performing a lawful contract for specific work upon the premises of the defendant, and the rule that the law will not impute to one person the negligent acts of another, unless the relation of master and servant or principal and agent exists, was again asserted.

The same doctrine was held in the Pierrepont case, where the Blake and Pack cases were followed, and it was declared that a contractor or his employés did not stand in the relation of servants to a person who was the owner of the property, and with whom the contract was made, and that the latter was not answerable for their negligence.

In *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, where the injury for which a recovery was sought resulted from the act of a contractor, it was again decided that the contractor was, in no sense, the servant of the defendant, and that the doctrine of respondeat superior did not apply.

The *Herrington* case was for damages occasioned by carelessness in blasting. The work was done by contractors, and the court followed its previous decisions and held that the defendant was not liable, but that the injury was occasioned by the negligence of the contractors, and that they alone were responsible.

The *Roemer* case was also for negligence in blasting and excavating on the defendant's premises, which adjoined the premises of the plaintiff. The work was done by a contractor, and the owner was held not liable.

It seems to me that the principle of these decisions is decisive of the case at bar, and is directly adverse to the contention of the respondent. The only authorities in this state ¹¹⁵ cited as sustaining the doctrine contended for, are *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, and *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437. The *Blake* case we have already referred to, which is a direct authority against the doctrine it is cited to sustain. In the *Storrs* case, the facts were different, and the principle of the decision has no application. There the doctrine of the *Blake*, *Kelly*, and *Pack* cases was expressly indorsed in the opinion of Judge Comstock, who said: "Now, in these two cases of *Pack v. Mayor etc.*, 8 N. Y. 222, and *Kelly v. Mayor etc.*, 11 N. Y. 433, the general doctrines so well set forth in *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, were applied with entire precision and accuracy." While the learned judge doubted the propriety of the application of that doctrine to the case of *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, he expressly recognized its correctness and its applicability to a case like this. The decision of the court in the *Storrs* case was placed upon the sole ground that it was the duty of the corporation to keep its streets in a safe condition for public travel, and for a failure to discharge that duty the corporation was liable. The question of the negligent manner in which the work was performed was entirely excluded by the opinion in that case.

There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a pub-

lic nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of those exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it. ¹¹⁶ In the case at bar, the work contracted for was lawful and necessary for the improvement and use of the defendant's property. Consequently, no liability can be based upon the illegality of the transaction, but it must stand upon the negligence of the contractor or his employé alone. It seems very obvious that, under the authorities, the defendant was not responsible for the acts of the contractor or his employés, and that the court should have granted the defendant's motion for a nonsuit. If a contrary rule were established, it would not only impose upon the owners of real property an improper restraint in contracting for its improvement, but would open a new and unlimited field for actions for the negligence of others which has not hitherto existed in this state, and practically overrule a long line of decisions in this court which firmly establish a contrary doctrine.

It follows that the judgment should be reversed.

JUDGES GRAY, BARTLETT, AND HAIGHT expressed their dissent in an opinion written by the former, claiming that the work which the defendant employed the contractor to perform was of a character which, if not carefully done, would probably inflict damage, and hence that it was the duty of the defendant to assure himself that any person employed to do it was qualified for the work, of good habits, and in all respects such a person as would so conduct it as not to inflict injury upon others, and that there was evidence tending to prove that the person employed was not a fit person to be employed in that class of work, and that the defendant, by the exercise of reasonable care, could have known such to be the case. In stating his conclusion that the judgment of the trial court ought to be affirmed, instead of reversed, he said:

"The principle of the decision below, in the present case, in my judgment, in no respect weakens the doctrine of the exemption of the general employer from liability for damages caused by the negligence of the independent contractor; nor, in any wise, threatens its stability. Nor does it affect it, otherwise than by establishing a reasonable safeguard against too broad a claim for exemption. It seems to me a proposition as clear as it is reasonable that the assumption that there has been an exercise of due care in the selection of a competent and careful contractor is a part of

the foundation for the doctrine. I do not think that it would do to hold that a person, by the mere act of employing a contractor to do some work of a nature in itself obviously hazardous to others, thereby discharges himself of all responsibility. Something more is required of him. With that due regard for his neighbor's rights which is obligatory upon all in the use which they make of their own property, he should be held to the exercise of reasonable care and of some deliberation in the selection of a contractor. We are referred to decisions of the courts of other states, where this duty on the part of a general employer seems to have been distinctly recognized (*Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495; *Brannock v. Elmore*, 114 Mo. 55), and while precisely a similar case to this may not be found in our reports, the reasonableness of the proposition commends and sustains it. As I have suggested, it may be assumed as an inherent element of the employer's claim for exemption: See *Wharton on Negligence*, sec. 181; *Story on Agency*, 9th ed., sec. 454 a, p. 556, note; *Cuff v. Railroad Co.*, 35 N. J. L. 17; 10 Am. Rep. 205; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Sturges v. Theological Education Soc.*, 130 Mass. 414; 39 Am. Rep. 463. In the text-books and case, just referred to, it will be observed that the assumption I mention is recognized as one associated with the employment of an independent contractor. I do not think it needs much argument to vindicate the entire propriety of the assumption. The exemption from liability should not be so broad as to exclude the consideration of the manner in which the independent contractor was selected for the particular work. When we consider the hazards incident to the work of blasting, in a city block, there ought to be no question, where the work is obviously and necessarily of a dangerous nature, as to the propriety of imposing upon the owner of the property to be improved thereby a legal duty to exercise proper care in the selection of his contractor. If that be true, then the question of the exercise of due care becomes one of fact upon the evidence. If there is evidence proving, or tending to prove, that the contractor was an incompetent, or a reckless, or an unfit person to be intrusted with the job and that it was possible for the defendant to have discovered these facts by inquiry, then it is for the jury to render their verdict upon the issue between the parties. It is not essential that the defendant be shown to have known of the acts of incompetency, or of the conduct from which unfitness may be inferred. It is sufficient if it appear that no sufficient inquiry had been made, and that a careful inquiry might have revealed the incompetency or the unfitness. The circumstances of the selection of the contractor might be such as to justify a belief that there was a failure to exercise care and prudence in the matter.

"The conclusion, therefore, which I reach after a careful consideration of the question is, that the defendant, in employing a contractor to blast out the rock upon his premises, a work obviously dangerous to the adjoining owner, owed a legal duty to the plaintiff to carefully select one who was both competent and careful, and that for a failure to perform that duty, under the circumstances of this case, he became responsible for any injury to the plaintiff's property resulting from the contractor's negligence. I think that there was evidence adduced from which the jury might infer that the defendant had not proceeded with that care and due regard for the plaintiff's rights which were incumbent upon him. It may not have been very strong; but it cannot be said that there was none giving rise to inferences. Minds might differ upon the question; but that only goes to show the necessity of leaving it to the arbitrament of a jury. The learned justices below have thought that there was a question for the jury upon the evidence.

I think that they were right, and that there are no errors calling for a reversal of this judgment."

MASTER AND SERVANT—LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR.—Negligence of an independent contractor is not ordinarily chargeable to his employer: *Engel v. Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692, and note; monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 91. The exceptions to this rule arise when the work to be performed is necessarily injurious to a third person: *Williams v. Fresno Canal etc. Co.*, 96 Cal. 14; 31 Am. St. Rep. 172; or necessarily dangerous: *Omaha v. Jensen*, 35 Neb. 68; 37 Am. St. Rep. 432; or will create a nuisance: *James v. McMinimy*, 93 Ky. 471; 40 Am. St. Rep. 200; or will probably cause injury to others, unless due precautions are taken to avoid harm: *Thompson v. Rowell etc. Street Ry. Co.*, 170 Mass. 577; 64 Am. St. Rep. 323; or where the employer owes a duty to third persons or the public in the performance of the work: *City etc. Ry. Co. v. Moores*, 80 Md. 348; 45 Am. St. Rep. 345; or where the act to be performed is illegal: *Engel v. Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692. See monographic note to *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 200-208.

PEOPLE v. MORTON.

[156 NEW YORK, 186.]

MANDAMUS UNDER THE COMMON LAW issued in the king's name to inferior courts, officers, corporations, or persons, but not to the king himself, to parliament, nor to the judiciary, except to such inferior courts as the higher court has power to review.

MANDAMUS NEVER ISSUES TO THE EXECUTIVE OR LEGISLATIVE BRANCH OF THE GOVERNMENT nor to the judicial branch having final jurisdiction.

MANDAMUS MAY BE ENFORCED ONLY by the commitment, as for contempt, of the person who refuses to obey, and hence will not be issued against one whom the courts have not power to commit and imprison.

MANDAMUS WILL NOT ISSUE AGAINST THE GOVERNOR OF THE STATE to compel him to perform any duty devolving upon him by virtue of his office, though it is a duty which the legislature might have committed to another officer. Hence, the writ will not issue to him as a member of the board of trustees of public buildings.

MANDAMUS MAY ISSUE TO THE LIEUTENANT GOVERNOR, AND TO THE SPEAKER OF THE ASSEMBLY during the recess of the legislature, for during such recess they are not exempt from arrest and imprisonment.

MANDAMUS AGAINST SUCCESSOR IN OFFICE.—If an officer refuses to perform an official duty, and an alternative writ of mandate issues against him, after which his term of office expires, the writ cannot issue against his successor, where the delinquency charged was personal and did not involve a claim prosecuted against the state, in which it alone was interested. Where the delinquency charged is personal, the petition for the writ abates upon the death, resignation, or expiration of term of office of the official charged, unless it is preserved by statute.

G. B. D. Hasbrouck, for the appellants.

Michael D. Nolan, for the respondent.

¹³⁹ HAIGHT, J. For a number of years the relator had been employed in the capitol of the state as a laborer, engaged in the running of the senate elevator. On the second day of October, 1895, he claims he was discharged. After the expiration of about five months, he procured an alternative writ of mandamus to issue to the then trustees and superintendent of public buildings, requiring his reinstatement as laborer in the capitol, upon the ground that he was an honorably discharged Union sailor of the war of the Rebellion. To the alternative writ an answer was filed on behalf of the defendants, raising an issue, which, upon the stipulation of the parties, was referred to a referee to hear, try, and determine. After taking the evidence submitted by the respective parties, the referee made his report, finding that the relator had been dropped from the payrolls by reason of the shutting down of the senate elevators for repairs, and that he had not been removed. Thereupon, the peremptory writ was refused by the special term. An appeal was then taken to the appellate division, where the order of the special term was reversed and a peremptory writ issued.

At the time the relator procured the alternative writ of mandamus, Levi P. Morton was the governor of the state, Charles T. Saxton, the lieutenant governor, and Hamilton Fish, the speaker of the assembly.

The public buildings law of 1893, chapter 227, as amended, ¹⁴⁰ provides that "the governor, lieutenant governor, and speaker of the assembly shall be trustees of public buildings." As such they are authorized to appoint a superintendent who, "subject to the approval of the trustees, may appoint all persons necessary in the maintenance department of the public buildings and grounds under his charge, and suspend and remove any of them, and prepare rules and regulations for their government."

It will be observed that, under the provisions of the statute, the governor, lieutenant governor, and speaker become trustees by virtue of their offices, and that whatever duties devolve upon them as such, pertain to their respective offices.

Chapter 312 of the laws of 1884, as amended by chapter 716 of the laws of 1894, provides that: "In every public department and upon all public works of the state of New York, and of the cities, towns, and villages thereof, and also in noncompetitive examinations under the civil service rules, laws, or regulations of the same, wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment; age, loss of limb, or other physical impairment which

does not, in fact, incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. And, in all cases, the person having the power of employment or appointment, unless the statute provides for a definite term, shall have the power of removal only for incompetency and conduct inconsistent with the position held by the employé or appointee; and, in case of such removal, or such refusal to allow the preference provided for in this act of and for any such honorably discharged Union soldier, or sailor, or marine, for partisan, political, personal, or other cause, except incompetency, and conduct inconsistent with the position so held, such soldier, sailor, or marine, so wrongfully removed, or refused such preference, shall have a right of action in any court of competent jurisdiction for damages as for an act wrongfully done, in addition to the existing right of mandamus; the burden of proving such ¹⁴¹ incompetency and inconsistent conduct, as a question of fact, shall be upon the defendant." A failure on the part of the officials to comply with the terms of this act in letter and spirit is made a misdemeanor.

It is now contended that the appellate division had no jurisdiction to award a mandamus in this case. Much has already been written upon the subject. The courts of most of the states in the Union have had it under consideration, and, while they uniformly agree that the courts have no right nor power to interfere with the governor upon questions involving his judgment and discretion, yet they differ widely as to the power to interfere with his ministerial action. We shall not attempt any extended digest of these cases. Among those tending to sustain the power of the court to compel the executive to perform a ministerial act are *Martin v. Ingham*, 38 Kan. 641; *Harpending v. Haight*, 39 Cal. 189; 2 Am. Rep. 432; *Middleton v. Low*, 30 Cal. 596; *Tennessee etc. R. R. Co. v. Moore*, 36 Ala. 380; *Chumasero v. Potts*, 2 Mont. 242, *Cotten v. Ellis*, 7 Jones, 545; *State v. Governor*, 5 Ohio St. 528; *State v. Moffit*, 5 Ohio, 362; *Magruder v. Swann*, 25 Md. 212; *Chamberlain v. Sibley*, 4 Minn. 309.

Of the cases which support the contention that the courts are without jurisdiction to control executive action are the following: *Sutherland v. Governor*, 29 Mich. 320; 18 Am. Rep. 89; *State v. Drew*, 17 Fla. 67; *State v. Towns*, 8 Ga. 360; *People v. Cullom*, 100 Ill. 472; *People v. Bissell*, 19 Ill. 229; 68 Am. Dec. 591; *State v. Kirkwood*, 14 Iowa, 162; *State v. Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; *Dennett, Petitioner*, 32 Me. 508; 54 Am. Dec. 602; *State v. Stone*, 120 Mo. 428; 41 Am. St. Rep.

705; *State v. Governor*, 25 N. J. L. 331; *Mauran v. Smith*, 8 R. I. 192; 5 Am. Rep. 564; *Bates v. Taylor*, 87 Tenn. 319; Judiciary Article, 85 Tex. 622; *Marbury v. Madison*, 1 Cranch, 137.

The ministerial duties which it has been held in different states may be compelled by mandamus are the commissioning of a clerk of a court, the issuance of a warrant for the attorney general's salary, the auditing of an officer's claim for expenses, the commissioning of officers chosen by the legislature, the issuance of state bonds to a railroad company, the ¹⁴² authentication of a bill in the governor's possession as a statute, the issuance of a proclamation that a bank is authorized to begin business, and such duties imposed by statute upon the governor as might have been imposed upon another officer, when ministerial. On the other hand, in a large number of other states, it has been held that a mandamus will never issue against the governor, regardless of the duty imposed upon him by the constitution or statute. In those cases, it was considered to be against public policy and political necessity, and to be immaterial that the duty might have been imposed upon another person; that inasmuch as it was imposed upon the governor, its performance was an executive act, under the responsibility of his executive station, and under the sanctity of his official oath. Perhaps the leading case in support of the latter contention is that of *Sutherland v. Governor*, 29 Mich. 320, 18 Am. Rep. 89, in which the opinion was delivered by Judge Cooley. In that case, the court was asked to compel the governor to perform the duty imposed upon him by statute, of certifying as to the completion of certain work. The judge says with reference thereto: "It is not claimed on the part of the relators that this court, or any other, has jurisdiction to require and compel the performance by the governor of his political duties, or the duties devolved upon him as a component part of the legislature. It is conceded that these, under the constitution and laws, are to be exercised according to his own judgment and on his own sense of official responsibility, and that from his decision to act, or decline to act, there can be no appeal to the courts. Nor is it pretended that where any executive act whatsoever is manifestly submitted to the governor's judgment or discretion, such judgment or discretion can be coerced by judicial writ. What is claimed is, that where the act is purely ministerial and the right of the citizen to have it performed is absolute, the governor, no more than any other officer, is above the laws, and the obligation of the courts, on a proper application, to require him to obey the laws, is the same

that exists in any other case where an official ministerial duty is disregarded. . . . There is no ¹⁴³ clear and palpable line of distinction between those duties of the governor which are political and those which are to be considered ministerial merely, and, if we should undertake to draw one and to declare that in all cases falling on one side of the line, the governor was subject to judicial process, and in all falling on the other, he was independent of it, we should open the door to an endless train of litigation. . . . However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons." Again he says: "When duties are imposed upon the governor, whatever be their grade, importance, or nature, we doubt the right of the court to say that this or that duty might properly have been imposed upon a secretary of state, or a sheriff of a county, or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore, there must be the like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority, and duty to the governor is either made by the people in the constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and, consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would ¹⁴⁴ concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

In this state we have not found, nor has our attention been called to, any controlling authority upon the question. Under

our constitution the right of sovereignty rests in the people of the state, who, from time to time, delegate their power to rule to a government chosen by themselves, consisting of three departments, known as the executive, legislative, and judicial. In England, the power of the king to govern was modified from time to time by various grants from him, and by Magna Charta, under which the law-making power finally devolved upon parliament, and the judicial power upon the courts, created by law. This division of power was followed in the formation of our American governments. In our own state, the common law was continued in force, except in so far as it has been altered by the constitution or the legislature.

Under our constitution the executive power of the state answers to that of the king, and devolves upon the governor during the term for which he is elected. The legislative power is vested in the senate and assembly, which take the place of parliament, and the judicial power in the courts established in accordance with the provisions of the constitution. The three great branches of government are separate and distinct, but are coequal and co-ordinate; their powers have been carefully apportioned; one makes the laws, another construes and adjudges as to the rights of persons to life, liberty, and property thereunder, and the third executes the laws enacted and the judgments decreed. While each department, in its sphere, is in a sense independent, each operates as a check or restraint upon the other. The acts of the legislature have to be presented to the executive for his approval. The courts may then construe the acts and determine their validity under the constitution; and the executive may, in criminal cases, modify the action of the courts by the interposition of his pardoning power. But in every case in which one department controls, ¹⁴⁵ modifies, or influences the action of another, it acts strictly within its own sphere, thus giving no occasion for conflict and thus preserving the purpose of the original scheme of a division of power among the three co-ordinate branches of government, each operating as a restraint upon the other, but still in harmony.

As we have seen, the power of the king has been divided—a portion delegated to parliament and another portion to the judiciary—but except as delegated to the legislative and judicial branches of the government, his common-law powers remain unchanged, and in our government have been transmitted to the executive.

Under the common law, a writ of mandamus issued in the

king's name to inferior courts, officers, corporations, or persons, requiring them to do a particular thing specified. It, being issued in the king's name, did not run to himself, to parliament, nor to the judiciary, except such inferior courts as the higher courts had the power to review. Under our code, the writ issues out of the court as an order of the court; but we have attempted by no provision of the statute to change the force and effect of the common-law writ, nor its object and purpose. It therefore follows that the writ never issues to the executive or legislative branches of the government, nor to the judicial branch having general and final jurisdiction.

Again, it is the well-settled practice of the court not to determine abstract questions not involved in the litigation, or in regard to which it has no power to enforce its judgments and decrees.

The only way in which a mandamus can be enforced is by the commitment of the party who refuses to obey its commands as for a contempt. But the courts have no power to commit the governor for a contempt. They have no power over his person. He may be impeached, but there is no other way in which he may be deprived of his executive office. It is said, however, that it is not to be supposed that the governor will refuse obedience to the law; but the application in this ¹⁴⁶ case for the mandamus shows that he already has refused to do the act sought to be compelled by this writ.

But, again, it is contended that in this case the executive is one of a board of officers, and that the board may be compelled to act by mandamus. Conceding him to be one of a board of public officers, the duty is one that devolves upon him by virtue of his office. If the courts have not power over his person to enforce its decrees in the one case, they have not in the other.

We have already referred to the discussion of Judge Cooley in the Sutherland case, with reference to the grade of duties imposed upon the executive, including ministerial acts, together with those involving executive judgment and discretion; and without repeating his argument here, it appears to us that his reasoning is unanswerable and his conclusions correct.

While we are of the opinion that a mandamus will not issue to the governor to compel performance of an act by him, we see no reason for its not running, during the recess of the legislature, to the lieutenant governor, and speaker of the assembly. During the session of the legislature, they, as members thereof, are not subject to arrest; and it may be that the courts, during

that time, would not have the power to enforce their mandates against them; but, after the adjournment of the legislature, and the time has elapsed given by the statute in which they are exempted from arrest, we think their obedience to the writ may be compelled by the courts. True, under the provisions of the constitution, they in turn may succeed to executive power, upon the happening of certain events; but until they respectively become vested with the powers of the governor, they form no part of the co-ordinate branches of the government, except, as we have already stated, when the legislature is in session.

There is another reason which must control our action in this case. As we have seen, the alternative writ of mandamus was issued during the administration of Governor Morton, when Saxton was lieutenant governor and Fish was speaker. The special term denied the writ, but, upon appeal, the appellate division reversed the order of the special term ¹⁴⁷ and ordered the writ to issue to the governor, lieutenant governor, and speaker then in office, who were the successors of those in office at the time the alternative writ was issued. This was done without notice to the new officials, and without bringing them in or making them parties to the proceeding. The act charged against the former officials was a misdemeanor, and punishable as such, and they were liable individually in damages to the party aggrieved. The delinquency charged is personal, and does not involve a charge against the state. It is not a claim prosecuted against the state in which it alone is interested, as where a mandamus is issued to a treasurer or comptroller of the state, to compel the payment of a claim against it, which is litigated by the officer for and in behalf of the state, in which the courts have permitted the mandamus to issue to the successor in office. In cases in which the delinquency charge is personal, the petition for a writ of mandamus abates upon the death, resignation, or termination of office of the official charged; unless it is preserved by statute: *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 31, and cases there cited.

Under the provisions of our Code of Civil Procedure, section 755, a special proceeding does not abate by any event, if the right to the relief sought in such proceeding survives or continues; but this provision only applies to cases where the party dies after this act takes effect. There has been no death of a party in this case. Certain of the parties proceeded against have gone out of office, and it may, therefore, be doubted whether this section keeps the proceeding alive. But, assuming for the

purpose of this case that it does and that the relator still has the right to prosecute his proceeding for his restoration, against whom must such proceeding continue? It cannot be continued against the old officers, for they no longer have power to restore him. It must, of necessity, therefore, be prosecuted against the new officers, for they alone have the power to reinstate him. It may be that the provisions of the code fail to point out the precise practice that should be adopted by the relator in this case. ¹⁴⁸ But there is no apparent reason why the provisions of the code controlling actions and special proceedings against county, town, and municipal officers, should not apply as well to state officers. The practice therein provided for is simple and affords ample protection to all parties. Section 1930 provides: "In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution has been personally served upon him." As we have seen, no substitution has been made in this case.

The order of the appellate division should be reversed, and that of the special term affirmed.

JUDGE O'BRIEN DISSENTED. He claimed that the proposition was indisputable that when the governor of the state accepted the legislative appointment as a member of the board of trustees, with duties prescribed by statute, he became amenable to legal process at the suit of a private citizen whose rights were affected. In support of his view, he cited *Marbury v. Madison*, 1 Oranch, 170; *Kendall v. United States*, 12 Pet. 595; *Board of Liquidation v. McComb*, 92 U. S. 531; *United States v. Black*, 128 U. S. 40; *United States v. Blaine*, 139 U. S. 306; *Ferguson v. Earl of Kinnoull*, 9 Clark & F. 251; *State v. Governor*, 5 Ohio St. 535; *People v. Morton*, 148 N. Y. 156; *Gray v. State*, 72 Ind. 567; *Low v. Towns*, 8 Ga. 370. The judge denied "that the judicial power of the state is so feeble as to be unable to reach with its process, in the enforcement of its lawful judgments and decrees, every citizen within its territory, from the governor to the humblest workman, and one as well as the other."

The judge, in his dissenting opinion, also denied that the expiration of the terms of office of the original defendants prevented the court from entering an appropriate judgment against their successors, because the relief to be awarded was "against the board as an official board, and the fact that the individuals composing it are also named is of no consequence. The proceedings do not abate upon every change of membership, but when, as in this

case, there is a continuing duty, irrespective of the incumbent, the writ is properly directed to the board as then constituted and who have the power to redress the wrong": *People v. Collins*, 19 Wend, 56; *People v. Champion*, 16 Johns. 61; *People v. Gilson*, 121 N. Y. 551; *Thompson v. United States*, 103 U. S. 480, 483; *State v. Madison*, 15 Wis. 30; *State v. Gates*, 22 Wis. 210, 214; *High on Extraordinary Legal Remedies*, sec. 38.

MANDAMUS—NATURE OF WRIT AND ITS FUNCTIONS.—A writ of mandamus is a command issuing from a court of law of competent jurisdiction, in the name of the state or sovereign, directed to some inferior court, officer, corporation, or person, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law: See monographic note to *Dane v. Derby*, 89 Am. Dec. 728. Legislative officers, in as far as concerns their legislative functions, are beyond control of the courts by the writ of mandamus: Extended note to *Mayor v. Morgan*, 18 Am. Dec. 239. Neither will mandamus issue to control an executive officer in discharging an executive duty involving the exercise of discretion or judgment: *American Casualty Ins. etc. Co. v. Fyler*, 60 Conn. 448; 25 Am. St. Rep. 337.

MANDAMUS AGAINST GOVERNOR.—The action of the governor in the exercise of his political or governmental powers, whether conferred by constitution or statute, cannot be controlled by mandamus: See monographic notes to *Hawkins v. Governor*, 33 Am. Dec. 361-368, and *Greenwood etc. Land Co. v. Routt*, 31 Am. St. Rep. 294-304, on mandamus against a governor. The fact that he has submitted himself to the jurisdiction of the court is immaterial: *State v. Stone*, 120 Mo. 428; 41 Am. St. Rep. 705.

NELSON v. ONEIDA.

[156 New York, 219.]

EVIDENCE — CONFIDENTIAL COMMUNICATIONS.—A PHYSICIAN who discovers a fact or condition while attending his patient in relation to her person, will not be permitted to testify thereto without her consent, though such discovery was not required for his guidance or assistance in the discharge of his professional duties, if it was a necessary incident to the investigation made by him to enable him to discharge those duties. Hence, if a physician, employed to attend a woman in childbirth, incidentally discovers umbilical hernia he cannot testify thereto.

Edwin J. Brown, for the appellant.

E. L. Hunt, for the respondent.

²²⁰ PARKER, C. J. The judgment under review awards to the plaintiff twenty-five hundred dollars for damages sustained by a fall due to a defective sidewalk.

The injuries the plaintiff claimed to have suffered were an umbilical hernia, a prolapsus of the uterus, and several bruises.

²²¹ The defendant attempted to show by the plaintiff's physi-

cian that she had an umbilical hernia before the accident, and the exception taken to the exclusion of the evidence is relied upon by the appellant as furnishing sufficient ground for a reversal of the judgment. The physician testified that prior to the accident he had attended upon and treated her as a physician more or less during eight or ten years, and within such period had attended her at childbirth upon two occasions. Plaintiff's counsel at this point objected to the testimony of the witness under section 834 of the code.

The court then made some inquiries of the witness with the following result: "The Court: Doctor, I assume that all your visits to this plaintiff were prior to this accident? A. They were. The Court: And all of your visits were visits that were made at her or her husband's request, and you visited her and prescribed for her as her physician? A. I did. The Court: And whatever you know or learned, you know and learned in that capacity? A. Yes, such information was necessary to enable me to easily and understandingly treat the case."

The court decided not to strike out the evidence the witness had given, but inquired of defendant's counsel whether there was any other nonprivileged evidence the witness could give. To this inquiry counsel made reply as follows: "In the first instance, this plaintiff says that never prior to this occasion did she have an umbilical hernia, she says that Dr. Cavana never treated her for umbilical hernia; and we can prove by Dr. Cavana that he has never treated her for umbilical hernia, but I can prove also, on the occasion of the other treatment he gave her he discovered an hernia, and that the information wasn't in any manner necessary to enable him to treat her for the other troubles that he did treat her for."

The court answered: "But the difficulty is, if he hadn't been treating her and examining her in that confidential capacity, he never would have discovered it."

The point of difference between the court and counsel was this: Counsel insisted that if the physician discovered the ²²²umbilical hernia while attending his patient at childbirth, but did not treat her for it, and the knowledge was not necessary for his guidance in assisting in the delivery of a child, he could disclose it, while the position of the court was that the very nature of his employment compelled this disclosure to him by the patient, and therefore it is privileged under the statute.

Section 834 of the code is as follows: "A person, duly authorized to practice physic or surgery, shall not be allowed to dis-

close any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity."

The evidence offered was clearly within the protection of the statute. The witness acquired the information which the defendant desired to elicit from him while attending the patient in a professional capacity, and the discovery of an umbilical hernia was a necessary incident of the investigations made to enable him to act in that capacity.

Our attention is called to certain authorities which the appellant insists support his position, but the proposition presented in this case was neither involved nor decided in any of them.

In *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, a physician attended a patient professionally in 1862 and never afterward. His acquaintance with his former patient continued, however, until his death a number of years later. The witness was asked if D. was cured when he left his hands; if in his opinion D. was in good health, of sound body, and one who usually enjoyed good health in 1867, some five years after his attendance upon him had ceased. And whether, in his opinion, excluding any knowledge or information obtained while treating D., and judging from his appearance from that time until 1867, D. was in good health. The court held that these questions were such as could properly be put to a physician under the provisions of the statute. It will be observed, however, that these questions are not like the one presented in this case. What the learned judge who wrote ²²³ the opinion had to say bearing upon this question was not, therefore, a part of the decision, but it may be referred to as indicating quite clearly that when he wrote the opinion he did not contemplate that professional ingenuity would later claim from the decision support in a case like this. In discussing the statute generally he says: "The exclusion is aimed at confidential communications of a patient to his physician, and also such information as a physician may acquire of secret ailments by an examination of the person of his patient. The policy of the statute is to enable a patient, without danger of exposure, to disclose to his physician all information necessary for his treatment."

It is apparent that in the mind of the judge there was no distinction between the disclosure of ailments by word of mouth and such disclosure by exhibition of the body.

This question was not involved in *People v. Schuyler*, 106 N. Y. 298. The doctor in that case was the jail physician, while

the defendant was an inmate of the jail awaiting trial under an indictment for murder where the defense was insanity; upon the trial a hypothetical question was put to the physician from which was excluded all personal knowledge which he had of the defendant, but which was based entirely upon facts which had occurred before the defendant came to the jail; the witness was requested to answer without reference to anything except the facts stated, whether the defendant was sane or insane when he committed the act. In this court it was held that the trial court erred in assuming that the mere fact that the witness was the jail physician created the relation of patient and physician between him and the defendant, the fact being that "there was no proof that the defendant was at any time sick during the six months in which the witness was the jail physician, or that the witness ever attended or prescribed for him as a physician, or derived any information upon which the question or answer thereto, could be based, while attending him as a physician."

In *Hoyt v. Hoyt*, 112 N. Y. 493, the testator's physicians were, in the first instance, permitted, without objection, to ²²⁴ give testimony which would otherwise have been excluded. Subsequently, a motion was made to strike out the testimony, which was denied. This court decided merely that the denial of the motion to strike out was not error.

In *Fisher v. Fisher*, 129 N. Y. 654, the physician was asked various questions as to the mental condition of his patient, excluding from his mind in answering the questions any knowledge or information he had obtained while acting as her medical attendant, and confining his answers to such knowledge and information as he had obtained by seeing her when she was not his patient.

Other cases are cited, but reference need not be made to them, as none of them holds that the statute permits a physician to disclose what he discovers while making an examination of his patient for the purpose of treatment.

The judgment should be affirmed, with costs.

All concur, except Martin, J., not sitting.

PHYSICIANS AND SURGEONS—PRIVILEGED COMMUNICATIONS.—Communications made by a patient to his physician for the purpose of professional aid and advice are privileged. The immunity extends to all facts, whether learned directly from the patient, or acquired by the physician through his own observation or examination: *Springer v. Byram*, 137 Ind. 15; 45 Am. St. Rep. 159, and note; monographic note to *Thompson v. Ish*, 17 Am. St. Rep. 565-571; extended note to *Campau v. North*, 83 Am. Rep. 435-439.

**PIPER v. NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY.**

[156 NEW YORK, 224.]

RAILWAYS—CARE TO BE EXERCISED BY PASSENGERS.—An intelligent passenger upon a railway train, then in motion, cannot omit to use his senses and assume there is no cause to be prudent and vigilant. While he may rely upon the performance by the railway company of all its duties to him, this does not relieve him from the duty of using his own senses of sight, hearing, and perception.

RAILWAYS—NEGLIGENCE OF PASSENGER IN WALKING OUT OF A VESTIBULE TRAIN.—If a passenger on a vestibule train undertakes to enter a closet, and the train is plunged into darkness by passing through a tunnel, and he opens the door, thinking it leads to the closet, but it opens out of the vestibule, and he is thrown out and injured, he is guilty of contributory negligence, precluding his recovery. The darkness called upon him to use special prudence, and, neglecting to proceed cautiously, he must accept the consequences of his undue precipitation.

Action to recover damages for personal injuries alleged to be due to the negligence of the defendant. Verdict and judgment in favor of the plaintiff; the defendant appealed.

Hamilton Harris and Edwin D. Worcester, Jr., for the appellant.

Joseph A. Burr, for the respondent.

226 GRAY, J. The plaintiff has sought to recover damages of the defendant for personal injuries, received by him while a passenger upon one of its trains, which were attributable, as he alleges, to neglect in management. He was a passenger upon the train from Albany to New York city in the night of January 13, 1892. He had purchased a ticket entitling him to a berth in a sleeping-car and took possession of it early in the evening, several hours before the car was attached to the train. The car was of the "vestibule" pattern; that being a construction, with respect to the platform, which permitted of a continuous passage from and to other similarly constructed cars without exposure to the discomforts or perils incident to a connection by open platforms. The sections for passengers were on either side of a straight aisle; which terminated, at either end, in washrooms for the use, respectively, of men and women. Beyond the washroom was the "vestibule"; on either side of which were doors opening upon the carsteps and furnishing ingress and egress to the train. On the night in question, the men's washroom was in the forward end of the car. On the

227 one side were the washbowls and on the other were, first, a porter's closet and, next to it, the water-closet. The door of the latter closet was about in the center of the washroom. The plaintiff had entered the car at Albany by that end, which, like the rest of the car, received its light from a hanging lamp. He had frequently traveled on vestibule trains and was familiar with the sleeping-car arrangements upon this and other railroads. He had occasion, after retiring for the night to his section, to go to the men's closet in this washroom and knew about its location. He was awakened in the morning by the porter, at about 6 o'clock, when the train was at or near Mott Haven, and, while partly undressed, again started for the men's closet. He observed that there was some light from a lamp in the center of the car and that some came through the windows of the sections, whose berths had already been made up. He testifies that, when he reached the threshold of the washroom, the part of the car where he stood was plunged into darkness and that he believed they were in the Park avenue tunnel. There was no lamplight in the washroom and none in the dome of the vestibule. He could distinguish such objects as the towels by the washbowls, but not one door from another. He proceeded on for a short distance, reached for the handle of the closet door, opened it, stepped, as he supposed, into the closet, and immediately fell off of the car and upon the track; where, after lying a while, he was picked up suffering from a fractured leg. He had opened the vestibule door, by mistake. He charges the defendant with the responsibility for the occurrence, in that the washroom was not lighted properly and that the vestibule door was not locked or bolted, and he alleges that more employes were needed to insure a proper observance of the rules in those respects. He recovered a verdict, which the general term has sustained, and the defendant now appeals to this court, asserting that not only its own freedom from negligence was shown, but that the plaintiff was guilty of contributory negligence, and that, therefore, it was error to refuse to dismiss the complaint upon the evidence.

228 I think that the plaintiff should have been nonsuited. If we might assume that the defendant's servants were guilty of some neglect of duty, which would impose a liability upon their employer for this accident (a proposition about which I entertain very considerable doubt), it is clear that the plaintiff failed to use that vigilance and prudence which it was incumbent upon him to use in the situation in which he was placed at the time.

He had been a frequent traveler upon railroads, and was familiar with such sleeping-car accommodations as were furnished in the present instance. Upon this occasion, he was either so confident of his steps as to be indifferent as to where, or how far they took him; or he was, from some cause or other, mentally preoccupied and oblivious of his surroundings and acted mechanically, instead of intelligently. That will not do and cannot be excused upon such an issue. An intelligent being, as the plaintiff certainly appears to have been, when placed in that unwonted situation which results from being rapidly transported over the ground by the appliance of powerful mechanical forces and the use of such vehicles as are adapted to the purpose, cannot omit to use his senses and assume that there is no cause to be prudent and vigilant. He has the right to rely upon the performance by the railroad company of its duty to exercise the utmost degree of care and skill which human prudence and foresight can suggest in transporting him; but that does not relieve him from the duty of using his own senses of sight, hearing, and perception. However great the perfection attained in the operation of railroads, a train is not absolutely a safe place, nor a normal situation for a person. Railroad companies are not insurers of the safety of travelers. When they have done all that human skill, prudence, and foresight suggest, in the way of precautions and of a safe roadbed, of suitable passenger-cars and of such proper mechanical appliances as are required in the operation of a train, they cannot be required to do more. Such risks as arise from heedlessness on the part of the passenger cannot be foreseen, and if the railroad company is to be liable for them, then, indeed, it becomes an insurer of the safety of its passengers.

²²⁹ This accident was not attributable to defects in any of the appliances or machinery designed for the operation of the train. It happened simply because, put in its briefest form, the plaintiff, not regarding the darkness of the moment, opened the wrong door of several and walked out of the car, instead of into a closet. Was the company bound to foresee and to provide against such an extraordinary occurrence and such heedless conduct? Practically put, the question is this: Can a man in the full possession of his senses, traveling upon a railroad train and finding himself plunged into darkness, at a moment when groping about in the car, proceed with the same confidence as in the light and be regarded as a prudent man? The question seems to answer itself.

Of course, the plaintiff insists that whether he contributed to the result by his acts was a question upon the facts for the jury to decide. The argument, in effect, is, that if he had the right to assume that the rules would be observed and, therefore, that the vestibule door was properly bolted, then he had the right to grope about in the dark without fear of consequences, and whether he acted in so doing as a prudent man is for the jury to say. I cannot find any authority for that in the cases, and I think that reason refuses its approval to such a proposition. If the fact was, and we must under this verdict so assume, that the light was out in the washroom, either from its sudden extinguishment or by inattention, and the sudden entering of the train into the tunnel left the plaintiff in darkness, he had two courses open to him. He could wait for the light to be renewed, or he could try to reach the closet door without any sufficient light to guide him. What he said he did was to step out, without any hesitation, to open the door that he came to and to continue on in perfect confidence, and that thus he fell off of the car. There were several circumstances which should have, more or less forcibly, made a man with his wits about him notice his situation; especially one so familiar as the plaintiff was with the car arrangements. When he crossed the threshold of the washroom, from the car aisle, he had about only two and one-half feet to go to be opposite ²³⁰ the door-knob of the men's closet. Dividing the floor of the car from that of the vestibule platform was a sill of some nine inches in width, with a total difference in height of the floors of about four inches, and the former was carpeted, while the latter was covered with a rubber mat. The vestibule door was divided into two parts, each some thirteen inches in width and united by projecting hinges on the inside, which permitted the door, upon being opened, to fold upon itself. Finally, upon opening the door, there was all the change from the atmosphere of the car to the peculiar atmosphere of a tunnel, and of a foggy and rainy morning. The absence of mind, which deprived the plaintiff of his ability to notice all these remarkable differences in the situation, might well have permitted him to fumble with the latch, or bolt, of the vestibule door without any awakening of his senses.

I think that we must hold, as matter of law, that the plaintiff was guilty of contributory negligence in utterly failing to use that prudence which was especially incumbent upon him under the circumstances of the situation. The darkness called upon him to use it, and, had he done so, the accident could not, with-

in any reasonable probability, have happened. A person, whose power of vision is temporarily obstructed by some supervening condition, should take the greater care, and should, if it be possible, await its passing away. If he neglects to proceed cautiously, he must accept the consequences of his undue precipitation. The following cases, among others, will suffice as more or less pertinent illustrations: *Lafflin v. Buffalo etc. R. R. Co.*, 106 N. Y. 142; 60 Am. Rep. 433; *Heaney v. Long Island R. R. Co.*, 112 N. Y. 125; *Hilsenbeck v. Guhring*, 131 N. Y. 674.

Therefore, without discussing at all the question of whether the defendant was shown to have been guilty of some neglect, I think, upon the plaintiff's own showing, that he was himself negligent and that it was error to refuse to dismiss his complaint and to submit the case to the determination of the jury.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

RAILROADS—PASSENGERS—RESPECTIVE DUTIES AND LIABILITIES.—In carrying passengers, railroads are held to the highest degree of care, diligence, and skill consistent with such mode or means of transportation under the circumstances: *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477; 59 Am. St. Rep. 910; *Connell v. Chesapeake etc. Ry. Co.*, 93 Va. 44; 57 Am. St. Rep. 786, and note; but there is also a corresponding obligation on the part of the passenger to act with prudence; and if his negligent act contributes to the bringing about of the injury he cannot recover: *Weber v. Kansas City etc. Ry. Co.*, 100 Mo. 194; 18 Am. St. Rep. 541; *Jammison v. Chesapeake etc. Ry. Co.*, 92 Va. 327; 53 Am. St. Rep. 813, and note; or if the injury could have been avoided by ordinary attention to his own safety, though the negligence of the company's agents also contributed to the accident: *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323; monographic note to *Ingalls v. Bills*, 43 Am. Dec. 364.

PEOPLE v. SHELDON.

[156 NEW YORK, 268.]

JURY TRIAL.—THE COERCION OF THE JURORS until they agreed upon a verdict seems to have been warranted by the common law. This common-law rule has been swept away. Any attempt on the part of the court to drive the jurors into an agreement demands a new trial.

JURY TRIAL—IMPROPER COERCION OF THE JURORS—WHAT IS.—A jury, after a seven weeks' trial in a criminal cause, during all of which time they had been kept together, retired in the evening and were considering their verdict until noon of the next day, at which time they came into court and asked some questions concerning the evidence. The desired information was given by the reading of the reporter's notes. They again retired, and, after being absent more than three hours, returned to the

court and announced that they had not agreed. Thereupon the court told them that it was for the interests of all concerned that there should be a decision; that he could not hear of a disagreement, and they must retire. They did as requested, but came back at the end of two hours requesting further instructions, which were given. The next day, a little before 1 o'clock in the afternoon, the jury, by the foreman, communicated with the judge in writing, stating that in his opinion an agreement was impossible. The court answered that the jury be conducted to a hotel and then brought back for further deliberation, saying, "I have made my own arrangements so as to be back at your call for to-day and for some time in the future, so that this case may be fully disposed of, if there is a possibility of it." He also, on their return to court, further addressed them relating to the length of the trial and the importance of reaching an agreement, adding: "To say at the end of all that time, at the end of all this labor and expense, that the question is no better off than it was when it started, is almost to confess incompetency in this matter." After being out eighty-four hours without beds or cots, one-half of the time in a small room, the jury agreed. It was hence held that the circumstances indicated that the jury had been improperly coerced, and that a new trial should be granted.

Robert L. Drummond, for the appellant.

George W. Nellis, for the respondent.

274 PARKER, C. J. The question before this court is not how long may a court keep a jury together, for that is a matter resting in the sound discretion of the trial court. Nor is the question whether a jury should be compelled to stay together more than one night without a bed, or at least a cot to lie on, for that, too, is a matter resting in discretion. It seems a wiser exercise of that discretion, however, to provide sleeping accommodations for the jury after the first night at least. This can be readily done in most hotels without interference with the requirement to keep the jury together. But while these questions are not before the court, the facts which suggest **275** them are, and, together with other facts, they command an answer to the query, May there be coercion of a jury in a capital case? If this question be answered in the negative, there follows the further inquiry, Was there coercion in this case?

By the ancient common law, jurors were kept together as prisoners of the court until they had agreed upon their verdict: Thompson and Merriam on Juries, sec. 310. It was regarded not only proper, but requisite, that they should be coerced to an agreement upon a verdict: Profatt on Jury Trial, sec. 475.

"A jury, sworn and out in a case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict": Coke on Littleton, 227 b; Blackstone's Commentaries, page 375, says: "The jury, after the proofs are summed

up, unless the case be very clear, withdraw from the bar to consider their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. . . . And it has been held that, if the jurors do not agree in their verdict before the judges are about to leave the town, the judges are not bound to wait for them, but may carry them to town in a cart."

In the Doctor and Student (1518), at page 271, it is said: "I take not the law of the realm to be that the jury, after they be sworn, may not eat or drink till they be agreed of the verdict; but truth it is there is a maxim and an old custom in the law that they shall not eat nor drink, after they be sworn, till they have given their verdict, without the assent and license of the justices. . . . And if they will in no wise agree, I think that the justices may set such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding a new inquest, and by setting fine upon them that they shall find in default, or otherwise as they shall think best in their discretion; like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf."

²⁷⁶ Mr. Emlyn, in his preface to the second edition of the State Trials, printed in 1730, says: "The law requires that the twelve men, of which the jury consists, shall all agree before they give in a verdict; if they don't, they must undergo a greater punishment than the criminal himself; they are to be confined in one room without meat," et cetera, "till they are starv'd. It would be pretty hard to assign any tolerable reason for this usage; if it has seldom or never happen'd I'm afraid it has sometimes been prevented only by the unjust compliance of some of the jurors against their own consciences. . . . To what end, therefore, are they to be restrained in this manner? It may, indeed, force them to an outward seeming agreement against the dictates of their own consciences, but can never be a means of informing their judgment or convincing their understanding. . . . Why must the jurors be compelled to an agreement one way or the other? After all, a forced agreement is no better than none. If the consent of him who stands out against the rest be of any regard, it ought to be free; if of none, then why can't a verdict be given without it?"

The inconsistency of insisting that every one of twelve men must agree before a verdict can be rendered, and at the same time justifying the court in coercing one or more jurors into an

agreement with their fellows, received early attention by the courts of this state.

In *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168, the defendant was tried under an indictment for conspiracy to defraud, and, the jury being unable to agree, the court, against the consent of the defendant, ordered a juror withdrawn and the jury discharged. Mr. Justice Kent, in an opinion reviewing prior cases at length, paid his respects (at page 309) to the rule formerly existing of compelling an agreement of the jury. He said: "The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine that does not stand with conscience, but is altogether repugnant to a ²⁷⁷ sense of humanity and justice. A verdict of acquittal or conviction obtained under such circumstances can never receive the sanction of public opinion. And the practice of former times, of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day."

In *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203, the defendant was indicted for manslaughter; the jury being unable to agree before the last moment the court would sit, they were discharged. The question arose whether defendant could be again put upon his trial on the indictment. In writing the opinion of the court Spencer, C. J., said: "In the case of *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168, all the authorities then extant upon the power of the court to discharge a jury in criminal cases, and the consequences of such discharge, were very ably and elaborately examined by Mr. Justice Kent, and it would be an unpardonable waste of time to enter upon a re-examination of them." The chief judge quotes largely from Justice Kent's opinion, and says: "The learned judge inveighs, with force and eloquence, against the monstrous doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that a verdict is not founded on temperate discussion, but on strength of body. Although the case of *People v. Olcott*, 2 Johns. Cas. 201, 1 Am. Dec. 168, was a case of misdemeanor, the reasoning is, in my judgment, entirely applicable to cases of felony; and, although the opinion was confined to the case under consideration, a perusal of it will show that it embraces every possible case of a trial for crimes."

Other comparatively early criminal cases in which the same

question was presented and passed on were *People v. Ward*, 1 Wheel. C. C. 469; *Grant v. People*, 4 Park. C. C. 527; *People v. Green*, 13 Wend. 55; *United States v. Perez*, 9 Wheat. 579.

In *Green v. Telfair*, 11 How. Pr. 260, a motion was made to set aside a verdict on affidavits. The judge said to the jury, in substance, this case has excited considerable feeling; the nature of jury trials implies concessions and compromise; no juror should control result, or otherwise the verdict would ²⁷⁸ be that of one man, not that of twelve; that for five years he had discharged but one jury that had failed to agree, and he should send them out again, and hoped they would agree. One of the jurors said he supposed (it being Saturday afternoon) their duties would be at an end, and they would be discharged at 12 o'clock, to which the judge replied that this was not so; that he was authorized to receive the verdict on Sunday, and besides it was his intention to go to Albany by the next train, and if they did not agree before he left he would return on Monday and receive their verdict. Jury retired, remained absent about half an hour, returned into court, and rendered a verdict for plaintiff.

Mr. Justice Harris, before whom the motion was made to set aside the verdict on the ground of coercion, said in the course of his opinion: "An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they are so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right to even allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. . . . That, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court."

In *Slater v. Mead*, 53 How. Pr. 59, the judge said to the jury: "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict." The jury retired, and soon returned and rendered their verdict of no cause of action. Verdict was set aside on motion at special term, the opinion citing with approval the remarks of Mr. Justice Harris in *Green v. Telfair*, 11 How. Pr. 260.

In *Ingersoll v. Lansing*, 51 Hun, 103, the court made no provision for discharging the jury in the absence of the presiding justice from the county, unless they ²⁷⁹ agreed, which com-

pelled them to bring in a verdict or remain in confinement for four days without aid, protection, or even the presence of the court. On appeal, this was held to constitute coercion, and, therefore, that the trial court erred in refusing to set aside the verdict. In the course of the opinion, which was written by Mr. Justice Follett, the opinion in *Green v. Telfair*, 11 How. Pr. 260, is cited with approval, and also *Pierce v. Pierce*, 38 Mich. 412. In the latter case, the jury retired on Tuesday P. M. Wednesday P. M. officer informed the judge that they could not agree. Thereupon the judge directed the officer to inform them, "The judge does not believe it yet, and you might say to them that it is essential that they agree to-night, as I am going, and I won't be back until day after to-morrow, and they might not get discharged until I come back, as Judge Coolidge is going to be here." The verdict was returned within an hour. It was held that the verdict should be regarded as coerced, the court saying: "Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice. The one may be right as well as the eleven, and if right may be able to persuade them. . . . And it is very possible, at least, that a message of this kind given would be regarded by the outstanding juror as a somewhat strong intimation of the judge's opinion of the plainness of the case and the impropriety of holding out."

In *Physioc v. Shea*, 75 Ga. 466, a new trial was granted where a verdict was rendered shortly after the judge told the jury (which had been out all night) that they could have breakfast at their own expense, they having had no supper.

In *Chesapeake etc. R. R. Co. v. Barlow*, 86 Tenn. 537, the jury reported inability to agree. The trial judge said: "This is too common, and you ought to agree"; that he would not discharge them, but should keep them together for the remaining three weeks of the term unless they agreed. They agreed next day. The verdict was set aside.

In *State v. Bybee*, 17 Kan. 462, the court said to the jury that they ought, by compromise and surrender of individual²⁸⁰ opinion, to agree, and that failure to do so would be an imputation on court and jury. In an opinion written by Judge Brewer the court presented its reasons for reversing the judgment in part, that while the court might call the attention of the jury to many matters that rendered an agreement desirable, such as time already taken, improbability of securing additional testimony, the general public benefit in a speedy close of a liti-

gation, the question of expense to parties and the public, yet no juror should be influenced to a verdict by fear that failure to do so would be regarded by the public as reflecting upon either his intelligence or his integrity. "Personal considerations should never be permitted to influence his conclusion, and the thought of them should never be presented to him as a motive of action."

That was a criminal case, and it may be said, in passing, that the language used by the trial judge to the jury is very much like that used on one occasion by the judge in the case at bar. The intelligence of the jury was not more sharply reflected upon in that case than in this, for the trial justice said: "This case has occupied nearly seven weeks, and to say now, at the end of all that time, at the end of all this labor and expense, that the question is no better off than it was when started, is almost to confess incompetency in this matter."

In *Hancock v. Elam*, 3 Baxt. 33, the judge ordered the jury locked up until they should agree, not allowing them to have dinner. Held, error.

Spearman v. Wilson, 44 Ga. 473, held: "The court erred in overruling the motion for a new trial, upon the ground that, after the jury was brought in and answered they had not and were not likely to agree, he stated to them that if they did not bring in a verdict very soon, he would make arrangements to carry them to Greensboro. This question was decided in *Gholston v. Gholston*, 31 Ga. 625."

In 16 American and English Encyclopedia of Law, 522, the rule is said to be that: "Language on the part of the court, the obvious tendency of which is to coerce an agreement on the part of the jury, affords grounds for a new trial. To insist too strenuously ²⁸¹ upon the necessity of an agreement may have such effect."

Terre Haute etc. R. R. Co. v. Jackson, 81 Ind. 19, 24, was an appeal from a decision overruling a motion for a new trial. Judgment was reversed and a new trial granted upon the ground of coercion. After the jury had retired and been out nine hours, the trial court, without consent of the appellant, "caused the jury to be informed through the bailiff having them in charge that, if they did not agree upon a verdict, the court would keep them until Saturday night, a period of four days, to which action of the court the defendant at the proper time, as soon as her attorneys learned of such action, objected and excepted."

"The action of the court cannot be justified. It constituted,

as it must have intended it should, a kind of coercion upon the jury, which was inconsistent with their proper independence. . . . A plain error was committed. Its plain tendency was to influence the jury."

Berry v. People, 1 N. Y. Cr. Rep. 43, 47, reported in memorandum, 77 N. Y. 588, is not at all in conflict with the trend of all recent authority upon this question. In that case, the jury, after being charged, retired for deliberation, and, upon returning to the court, asked for further instructions, and then announced their inability to agree upon a verdict. The recorder, addressing the jury, said: "I would discharge you, but under my sense of duty I cannot. After a few days the case has been presented to you, thoroughly argued and tried, witnesses were examined and cross-examined. I don't care what you find, guilty or not guilty, it is perfectly immaterial to me. But I say it is my duty, if you cannot agree, that I shall lock you up for the night. That is a most ungrateful thing to do to any jury. As I told you on Friday night, I didn't want you detained from your families, and I do not now. If you cannot agree I shall order an officer to take you in charge. I will give you fifteen minutes and see if you can arrive at a conclusion."

²⁸² But for the expression of the trial judge, "I shall lock you up for the night," his remarks would have presented no ground for criticism. This court was of the opinion that the trial judge did not intend to coerce the jury, that he sought merely to convey the idea that they would have to remain over night at the court. This court said in its per curiam opinion: "The alleged threat to lock up jurors if they failed to agree was, we think, only intended as a statement that the jury would have to remain over night, as the court would adjourn. Nothing like a threat of imprisonment or punishment could have been intended." The decision of the court, therefore, was that there had been no attempt at coercion, the language complained of not being susceptible of a construction that would give it that effect with the jury, and not that a judgment would be allowed to stand either where the trial court had attempted to coerce the jury, or the language used by him was of such a character that it probably had that effect. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, and *Taylor v. Jones*, 2 Head, 565, are in line with cases cited.

Reference has now been made to nearly all the cases which I have been able to find, of comparatively recent date, and they establish that the old rule permitting coercion of a jury in or-

der to secure a verdict has been swept away; that, under our present method, the independence of a juror is respected. An attempt to drive the members of a jury into an agreement is beyond the power of the court, and an obvious effort to effect such a result demands a new trial.

In this case, we can well understand the anxiety of the learned judge, who presided at the trial, to have it ended by a verdict of a jury. The trial had lasted nearly seven weeks; it had been a severe strain upon the jury to be kept together all that time; the expense had been exceedingly great for so small a county, and to have all this inconvenience, labor, and expense borne for nothing seemed a most unfortunate result, and one to be avoided if possible. But in the attempt to avoid it the learned judge, as we think, after a very careful consideration of the subject, fell into error, and, as a result, very likely coerced some members of the jury into an agreement ²⁸³ with their fellow members against their own personal convictions.

Some of the grounds upon which this conclusion rests will now be given.

At 8:30 P. M. of the eleventh day of March, 1897, the jury retired to consider a case the trial of which had consumed nearly seven weeks, during all of which time they had been kept together. All of that night and until 11:30 A. M. of the next day, the jury were presumably engaged in discussing the evidence, but at the hour last named they came into court and asked two questions about evidence. The information asked for was furnished by reading a portion of the stenographer's minutes. At 3:25 P. M. of the same day the jury came into court and announced that they had not agreed upon a verdict. The court then addressed the jury upon the importance of a decision of the question submitted to them, concluding as follows: "It is for the interests of all concerned and public justice that there should be a decision of this case, so that the question shall be put at rest. I cannot hear of a disagreement of this jury. You must retire, gentlemen."

The jury at once retired, and two hours later asked for further instructions, which were furnished by reading from the stenographer's minutes. The next day at 12:45 P. M. the jury presented to the court a written communication, which read as follows:

"The probability or even possibility of this jury ever agreeing is impossible, in my opinion.

"(Signed)

GEO. J. HOLDEN, Foreman."

For forty hours, covering two entire nights, this jury had been engaged in the consideration of the testimony in a small room, and now for the first reported their deliberate judgment to be that an agreement was impossible. The court responded to this communication as follows: "The order will be that you be conducted to your hotel, and that you be brought back for further deliberation. . . . I have made my own arrangements so as to be back at your call, both for to-day and ²⁸⁴ for some time in the future, so that this case may be fully disposed of, if there is a possibility for it."

Language more apt to convey to a jury that the hardships of the past forty hours were to be continued for a considerable time in the future cannot easily be imagined. On their return the court addressed them at length, saying among other things: "I don't know that you fully appreciate the gravity and importance to this community and to the state that a decision should be reached in this matter, and that this important question shall be settled whether the defendant is guilty or innocent. This case has occupied nearly seven weeks, and to say now, at the end of all that time, at the end of all this labor and expense, that the question is no better off than it was when it started, is almost to confess incompetency in this matter."

We suspend quoting from the remarks of the court long enough to again call attention to *State v. Bybee*, 17 Kan. 462, in which the court reversed a judgment of conviction because the trial court, in urging the jury to agree, said "that failure to do so would be an imputation on court and jury."

In the opinion of the court written by judge, now Mr. Justice Brewer, it was said: "No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal consideration should never be permitted to influence his conclusions, and the thought of them should never be presented to him as a motive for action."

The position taken by that court meets with our approval, and it is alike applicable to the comment of the trial court in this case that a failure to agree "is almost to confess incompetency in this matter."

Taking up again the address of the court to the jury, who had solemnly announced that an agreement was impossible, we quote: "I have laid aside my other engagements so that this case can be attended to, because I appreciate the importance of it, and I would like to enforce upon you an appreciation of the

importance of settling this question; it has got to be settled." ²⁸⁵ Later on, but in this same address, the court said: "I know that your room is a narrow place and that you are a good deal confined there, and for that reason I have arranged with the sheriff that you shall occupy this room from now on until the completion of your labors. Of course, I don't know how long it will take."

The address was followed by an order entered on the minutes of the court "that the jury should be conducted to their meals at the usual hours to-morrow, Sunday, and including Monday morning." Monday morning came, and the jury sent word to the court that they had agreed; they had been out for about eighty-four hours without beds or cots; forty of those hours they had been confined in a small room. From the remarks of the court, and the treatment they had received, they had every reason to believe that a still longer confinement on chairs and hard benches was in store for them, a physical strain such as only strong men could stand. If one or more members of the jury surrendered their convictions to put an end to the punishment they were undergoing, and with an indefinite continuance of which they were all threatened, it is not to be wondered at. Only very strong characters could have longer resisted the importunities of associates and the appeal of their own exhausted bodies for relief from the strain to which they had been so long subjected.

Enough has been said to call attention to some of the reasons which have led us to the conclusion that the agreement of this jury should be regarded as coerced. A verdict thus obtained ought not to be allowed to stand in any case, and, least of all, in one involving a human life.

The judgment should be reversed and a new trial granted.

All concur.

TRIAL—COERCING VERDICT—WHAT IS NOT.—Coercing a jury into an agreement upon a verdict was common under the ancient rules of common law, but there are few vestiges of such practice which are allowable at the present time: See monographic note to *McKinney v. People*, 43 Am. Dec. 75, 76. The court has a right to urge the jury to agree upon a verdict: *Gibson v. Minneapolis etc. Ry. Co.*, 55 Minn. 177; 43 Am. St. Rep. 482. Though after the jurors have been out some twenty-two hours, the judge tells them that the cause was submitted to them for decision and not for disagreement, and that he will give them a further trial, he cannot be regarded as having coerced a verdict: *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530; 63 Am. St. Rep. 399.

CANANDAIGUA v. FOSTER.

[156 NEW YORK, 854.]

PUBLIC STREETS.—IT IS THE DUTY OF A PROPERTY OWNER WHO HAS CONSTRUCTED A GRATING IN A SIDEWALK, as long as he owns and has full possession of the premises, to use reasonable diligence, to keep the grating in repair, so that it shall be as safe as any other part of the sidewalk.

LANDLORD AND TENANT—DUTY OF UPON THE LEASING A PART ONLY OF THE PREMISES.—Where, after constructing a grating in a sidewalk, the owner leases part only of the premises, as where he leases the lower story and retains possession of the upper he still owes to the public and to the municipality the implied duty to use reasonable care in inspecting and repairing the grating, though the tenant has, by implication, the exclusive right to use it.

William F. Cogswell, John Gillette, and C. A. Richardson, for the appellant.

Frank Rice and John Colmey, for the respondent.

³⁵⁶ VANN, J. By this action the plaintiffs sought to recover the damages which they had been compelled to pay on account ³⁵⁷ of personal injuries sustained by one McSherry, through an accident caused by a defective grate in the sidewalk in front of defendant's premises.

For many years prior to 1889 the defendant owned certain land on the northwest corner of Main and Bristol streets in the village of Canandaigua, bounded on the east and south by the outer line of said streets, and extending ninety-six feet on Bristol and forty feet on Main. A brick block consisting of several stores, three stories high, substantially covered the lot. In 1872, the grate in question, with several others, was constructed by the defendant along the north line of Bristol street to enable him and his tenants to convey coal to the cellars under said block, and they remained there without complaint on the part of the public authorities until March 4, 1889, when said McSherry stepped on one of the grates that was out of repair and was injured. This grate was in the sidewalk in front of a "store" in said block that was leased to one Parsons for a term which had not expired when said accident happened. The lease gave the defendant no right of access to the premises for any purpose during the term, and imposed upon him no obligation to make repairs. The tenant covenanted to surrender the premises at the end of the term in as good condition as they were at the date of the lease, necessary wear and damage by the elements excepted. The description of the demised premises included

the "store," with the privileges and appurtenances, but did not specifically describe or include the use of the sidewalk or the grate, which was in good order when Mr. Parsons took possession. The two stories over the store were retained by defendant or leased to other tenants who could not use the grate, as it was connected only with the premises leased to Parsons. After the commencement of said term the defendant repaired the grate once, but there was evidence tending to show that it had been out of repair for a number of weeks prior to the accident. When the plaintiffs were sued by McSherry, they notified the defendant to defend, and he aided in the defense, but the action resulted in a judgment against the village for sixteen hundred and eight dollars and twenty-nine cents, which ³⁵⁸ after affirmance both by the general term and the court of appeals, was paid by the plaintiffs: *McSherry v. Trustees*, 35 N. Y. St. Rep. 432; 59 Hun, 616; 129 N. Y. 612. The recovery in that case was upon the ground that the grating in the sidewalk was out of repair, and that the village authorities knew, or should have known, of the fact.

Upon the trial of the action now before us, the court charged the jury that if they found the grate was not properly reconstructed when repaired in 1888, and that was the cause of the accident, the defendant was liable to the plaintiffs, but, if they found "that it was not a faulty construction, he is not liable as far as that question goes." No fault is found by the appellant with this part of the charge. The court further charged that "upon all this evidence it is for you to say whether or not this defendant, acting with due care and reasonable diligence in the protection of the public against injury, ought to have known the condition in which that grate was. If he ought to have known it, he is in the same position, legally, as if he had actually known it, and, if he had actually known it, the duty rested upon him with diligence to put the walk into condition so it would be reasonably safe for public use. If you find that the defendant did not use reasonable care to ascertain whether or not the grate was in reasonably proper condition for public use, you will find a verdict for the plaintiff." To this the defendant excepted. The court also charged "that Mr. Foster owed no duty to repair the sidewalk generally which can be used as a basis for any recovery here, but he did owe the duty to keep in repair the particular place we are talking about." To this the defendant also excepted. These exceptions present the only question argued before us.

From the length of time the grate was permitted by the

representatives of the village to remain in the sidewalk without objection, the presumption arises that it was placed there with their consent: *Babbage v. Powers*, 130 N. Y. 281; *Jorgensen v. Squires*, 144 N. Y. 280. The defendant alleged in his answer that the grate was constructed with the consent of the plaintiffs, and, therefore, after the lapse of seventeen ³⁵⁹ years, he cannot be held liable as a trespasser, but only, if at all, upon the ground of negligence: *Irvine v. Wood*, 51 N. Y. 224, 228; 10 Am. Rep. 603. It was his duty, however, as long as he owned and was in full possession of the premises, to use reasonable diligence to keep the grate in repair, so that it would be as safe as any other part of the sidewalk: *Congreve v. Morgan*, 18 N. Y. 84; 72 Am. Dec. 495; *McGuire v. Spence*, 91 N. Y. 303; 43 Am. Rep. 668; *Shearman and Redfield on Negligence*, 5th ed., sec. 703. It was built for his accommodation and was a benefit to his property only, and the law placed upon him the obligation of using due care to keep it in a suitable and safe condition for the public to walk over as a part of the sidewalk. Proper construction, in the first place, was not enough to relieve him from liability, but the duty of inspection and repair continued while he owned and was in the exclusive possession of the premises. The duty ran with the land as long as the grate was maintained for the benefit of the land. As was said as early as *Heacock v. Sherman*, 14 Wend. 58, 60, the owner "is bound to repair . . . in consideration of private advantage." The doctrine of implied duty, which is well established by the authorities, requires the person who, even with due permission, constructs a scuttle hole in the sidewalk in front of his premises, to use reasonable care for the safety of the public, as long as it remains there and is subject to his control: *Babbage v. Powers*, 130 N. Y. 281; *Wolf v. Kilpatrick*, 101 N. Y. 146; 54 Am. Rep. 672; *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Davenport v. Ruckman*, 37 N. Y. 568; *Swords v. Edgar*, 59 N. Y. 28; 17 Am. Rep. 295; *Briggs v. New York Cent. etc. R. R. Co.*, 30 Hun, 291; *Heacock v. Sherman*, 14 Wend. 58; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Whalen v. Gloucester*, 4 Hun, 24; *Matthews v. De Groff*, 13 N. Y. App. Div. 356; *Elliot on Roads and Streets*, 541; *Thomas on Negligence*, 1145.

If, however, the grate is properly constructed in the first place, and is kept in proper repair afterward, the owner is not liable for the carelessness of a tenant or third parties in using the grate, as by leaving the hole unguarded when in use ³⁶⁰ or uncov-

ered when not in use: *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

The precise question now presented is, whether an implied duty rests upon the owner to use reasonable care in inspecting and repairing a grate in a sidewalk in front of his premises, when a part only of the structure on the abutting land is leased to and occupied by a tenant, but that part includes by implication the exclusive right to use the grate as a beneficial appurtenance. It must be conceded that, as between the defendant and his tenant, there was no obligation on the part of the former to repair, because he had entered into no covenant to that effect, and the duty of a landlord to make repairs rests solely on express contract, so far as his tenant is concerned: *Witty v. Matthews*, 52 N. Y. 512; *Clancy v. Byrne*, 56 N. Y. 129; 15 Am. Rep. 391. It must be further conceded that, if the store was in proper condition at the beginning of the term, the owner was not bound to repair it for the protection of those who, upon the express or implied invitation of the tenant, might enter it for the transaction of business or any other purpose: *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778.

The question before us did not arise between the owner and his tenant, or the patrons of the tenant, but between the owner and the plaintiffs, as representatives of the general public entitled to free and safe passage over the sidewalk as a part of the highway. While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself, which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk and covered it with the grate. That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks, and as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is ³⁶¹ an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So a lease of the entire premises and possession thereof by the tenant would doubtless throw the burden upon the latter: *Shearman and Redfield on Negligence*, 5th ed., secs. 710, 713. The conveyance of an undivided interest, however, would not

have that effect, and the demise of a part of the premises should not. The obligation goes with the land, and cannot be discharged by a partial alienation of the land, at least, unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passersby, for whose benefit the sidewalk is maintained, may be injured. If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession. If he transfers either title or possession in part only, he does not escape the burden. The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public as long as he remains the owner and is in possession of any part of the building on the abutting land. He cannot cast the burden of maintenance on the public any more than he could have cast upon them the burden of original construction, for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the safety of the public requires that the owner, as long as he is in possession of any part of the ³⁶² property, should be compelled to keep his structure in the sidewalk in suitable condition for use as a part of the sidewalk. As the duty is imposed by law for the public safety, its extent is measured by whatever public safety requires. Anything less than the alienation of the entire property, either permanently, as by deed, or temporarily, as by lease, would leave the public without adequate protection. A person injured by a defective grate should not be subject to the hazard of ascertaining the precise relation existing between the owner and one of his tenants with reference to the control of the grate, but a simple rule, resting upon ownership and possession, in whole or in part, of the adjacent structure, is required by sound public policy.

The argument that the defendant had no right of access to repair the grate, except by consent of the tenant, is without force, for the law imposing the duty was a part of the lease and

impliedly excepted from its provisions such necessary access at reasonable times as would enable the owner to discharge that duty. The lease covered the grate, by implication only, the same as it embraced the rights of the owner in the entire sidewalk in front of his premises. That would not prevent him from rebuilding or repairing the sidewalk proper, when required by municipal ordinance, nor does it prevent him from rebuilding or repairing the grate when required by the common law.

We find no error in the record, and the judgment should, therefore, be affirmed.

All concur, except Haight, J., not sitting, and Martin, J., not voting.

HIGHWAYS—LIABILITY OF ABUTTING OWNERS FOR DEFECTIVE SIDEWALKS IN CITY.—The first duty in relation to sidewalks rests upon the abutting owners and not upon the city: *Duncan v. Philadelphia*, 173 Pa. St. 550; 51 Am. St. Rep. 780. It is the duty of a property owner who maintains a coal-hole in a city sidewalk in front of his premises to exercise reasonable care and diligence in keeping it safe and secure, such owner being bound to know that persons will pass and repass, and step upon the cover without apprehending danger, not only in the daytime, but also in the nighttime: *Dickson v. Hollister*, 123 Pa. St. 421; 10 Am. St. Rep. 533, and note.

LANDLORD AND TENANT—LIABILITY FOR DEFECTIVE SIDEWALKS.—A landlord is answerable where an opening in a sidewalk is left unguarded by the janitor in his employ, who has general charge of the premises, and of such opening, though the building was rented in flats and apartments, and the janitor was also employed by them to deliver coal to their rooms: *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459. But he is not liable where the injury was due to the negligence of his tenant in failing to keep in repair a coal-hole, in good repair when the premises were leased: *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422; *Ryan v. Wilson*, 87 N. Y. 471; 41 Am. Rep. 384. If, however, the injury was due to the improper construction of the hole, he is liable: *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603. See note to *Dickson v. Hollister*, 10 Am. St. Rep. 536, 537.

DOUGLAS v. COONLEY.

[156 NEW YORK, 521.]

PARTY-WALLS—DESTRUCTION AND REPAIRING OF.—If a party-wall exists between two buildings, with an easement in favor of one of the buildings to use a stairway and doorway through a party-wall, and the buildings and wall are destroyed by fire, and the parties thereupon reconstruct the buildings and wall, the easement to maintain the stairway and to have and use the door is thereby revived.

PRACTICE.—WHEN A DEMURRER IS INTERPOSED TO AN ANSWER. all the allegations of the complaint and all new matters stated in the answer must be treated as true.

William P. Cantwell, for the appellants.

Walter J. Meares, for the respondents.

⁵²³ PARKER, C. J. By his will Henry B. Smith conferred upon executors named therein the power to sell and convey his real estate. It consisted in part of a three-story building that had three stores on the ground floor. The executors conveyed the middle store to Margaret A. Cantwell, and the store next adjoining it on the west to this defendant Coonley and one John Hughes, and Hughes' title has since been acquired ⁵²⁴ by the defendant Sophronia C. Smith. Between the said middle and west stores was a wall that the conveyance made a party-wall, and from the street to the upper rooms of the building, immediately adjoining this party-wall on the west side, there was a stairway that was used by the occupants of both buildings, it being the only mode of access between the upper and lower floors of either building. After Coonley and Hughes had become the owners of the west store, they undertook to confirm the alleged right of Margaret A. Cantwell to use this stairway in common with themselves as a means of ingress and egress to and from the two floors above her store, and to that end executed a deed of conveyance, by which, as the complaint recites, was "granted, sold, and conveyed to the said Margaret A. Cantwell, her heirs and assigns, the right of way to pass and repass up and down the passageway or stairway between the store owned by Margaret A. Cantwell and of the parties of the first part hereto at all times, in common with the parties of the first part hereto, for the purpose of going and returning to and from the rooms in the upper part of said stores. The party of the second part to pay one-half of the expense of keeping the stairway in repair." Subsequently, these plaintiffs succeeded to the title of Margaret A. Cantwell in and to the middle store, and thereafter and on the eleventh day of January, 1893, the entire building was destroyed by fire. The parties at once reconstructed the buildings on the same foundation as before, and united in the construction between the two stores of a party-wall similar to the one formerly existing, except as to the doorway leading from the head of the stairway to the second floor of the plaintiffs' building. The plaintiffs put in a frame for such doorway when the wall was being constructed, but afterward defendants tore the frame out and built that portion of the wall up solid, thus preventing the plaintiffs from obtaining access to their premises by means of the stairway. The defendants, though frequently requested,

refused to permit the plaintiffs to enjoy the stairway in common with them.

It is conceded that prior to the destruction of the building ⁵²⁵ by fire, the plaintiffs had a legal right to use as they did this stairway and the doorway in the party-wall as well, in common with the defendants. But it is contended that the effect of the destruction of the building by fire was to destroy this easement.

The diligence of counsel has not succeeded in bringing to light a similar case in this country, nor have we been more fortunate. The appellate division regarded the case as controlled by *Heartt v. Kruger*, 121 N. Y. 386; 18 Am. St. Rep. 829. That case is certainly authority for the proposition that these plaintiffs had no right to insist upon a reconstruction of the party-wall or of the stairway. The buildings having been destroyed without fault on the part of the defendants, it was their right thereafter to make such use of the land as should seem to them most conducive to their interests; they could not, by their own act, affect the plaintiffs' easement, but an outside force beyond the defendants' control having destroyed the buildings and the major part of the party-wall, it was within their power thereafter to so use the land that the plaintiffs' easements should not be revived. Had they done so, a situation would have been presented within the doctrine of *Heartt v. Kruger*, 121 N. Y. 386; 18 Am. St. Rep. 829. But this they did not do. Instead, they united with the plaintiffs in constructing a party-wall and rebuilt the stairway in precisely the same place as before, and thus, within a comparatively short period of time, the buildings, so far at least as the stairway and party-wall are concerned, were exactly the same as if the fire had never taken place. And the question is, Did this conduct of the parties operate to revive the easement that was suspended by the destruction of the property? If such be the effect of this action, the result is certainly equitable and in accordance with good conscience. The plaintiffs' predecessor in title, in purchasing the middle store, acquired the right to use the stairway and the doorway through the party-wall as a necessary incident to her enjoyment of the second and third stories of her building. Apparently, for the purpose of further assuring her right to use the stairway and the doorway as well, a grant of such right, presumably ⁵²⁶ upon a good and sufficient consideration, was made to her by these defendants. The grant was not intended

to be a temporary matter, or one purely for her personal convenience, for it ran to her, her heirs and assigns.

Why should she or her assigns be deprived of it now, inasmuch as the situation of the property is precisely the same as it was then? No good reason has been suggested by counsel for relieving the defendants from the easement which they undertook to confirm, if not create. The law afforded them an opportunity for the destruction of the suspended easement by an entirely different method of construction, and the reason of the law is, that in case of the destruction of an easement by the act of God, then a party ought to be at liberty to make the best possible use of his property and should not be burdened with the necessity of a reconstruction along the same lines. Presumably, these defendants found that a reconstruction of the building upon the old plan was the best possible use to which they could put the land, and, now that such reconstruction is accomplished, they insist that the other parties shall not enjoy the easement. The plaintiffs need not have united with the defendants in the construction of the party-wall, but did so with the expectation undoubtedly of enjoying the right supposed to be secured to them of access to the upper stories of the building. It certainly seems but just under all the circumstances that these expectations should be realized, and, hence, it becomes the duty of a court of equity to work out that result, provided it can be done within established equitable principles.

Mr. Washburn, in his work on the Law of Easements and Servitudes, says at page 568 (page 686, third edition): "It may be observed as a well-settled rule of the civil law, which would doubtless be regarded as a part of the common law, that if a house, a wall, a waterspout, or anything of that kind with which or by which a servitude exists or is enjoyed, is destroyed, and the same is afterward, within the period of prescription, reconstructed or restored, whatever may have been the servitudes connected therewith, they are, by such restoration, revived."

⁵²⁷ Courts of equity have frequently borrowed from the civil law certain of its rules and advantageously engrafted them upon our system of jurisprudence, and indeed the father of equity jurisprudence in this state, Chancellor Kent, made special use of it in the party-wall case of *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570, and, by way of introduction to its consideration, he said: "The rules and doctrines of the French law may be referred to by way of illustration and to show the pre-

vailing equity and justice of the rule of contribution in respect to party-walls."

From 3 Toullier Droit Civil Francais, 522, the following is taken:

"Sec. 684. Servitudes cease when the things are found in such condition that one can no longer use them. As if a dominant and a servient estate are destroyed. If they are submerged. If the house which holds the servitude and that to which it is due, are burned or demolished."

"Sec. 685. But the servitudes revive if the things are re-established in such a manner that one can use them, unless there has already elapsed a space of time sufficient to make a presumption of the extinction of the servitude. Thus where there is reconstruction of a mesne wall or a demolished or burned house, the servitudes, active and passive, continue in relation to the new wall without the power of their being increased, and provided that the reconstruction is made before the prescription is acquired."

Mr. Wait, in his Actions and Defenses, volume 2, page 680, under the head of "Easements of Special Purposes," asserts the doctrine that an easement is only suspended when the property is destroyed, and that it is revived when the estate is so restored that the servitudes are again of value to the dominant estate. That author asserts the same doctrine under the head of "Unity of the two Estates," at page 734. After stating the rule that the effect of the unity of the title of both the dominant and servient estates in one person is to extinguish the easement, he says: "The same is true to a limited extent when the possession only is united in one person. Thus, where the owner of the dominant tenement is also the ⁵²⁸ lessee of the servient estate, the easement will be suspended. But when the relation between the two estates terminates by the expiration of the lease or other lesser estate, the right is revived with the separation of possession."

This rule, well founded in reason, is applicable to this case, and, therefore, it becomes the duty of the court to hold that the effect of the reconstruction of the buildings, including the party-wall and the stairway as they were before, operated to revive the easement that had been for a time suspended by the destruction of the former buildings by fire.

The judgment under review was entered upon an order sustaining a demurrer to the defendants' answer, and their counsel now urges that the demurrer should have been overruled if either of the actions or defenses were well pleaded, and, also, if one ma-

terial allegation in the complaint was put in issue; if nothing else therein was denied or answered, the plaintiff must be put to his proof. True; but the counsel omitted to call the attention of the court to the material allegation in the complaint put in issue by the answer, and we are unable to find it.

New matter is set up in the answer, and in such case all the allegations of the complaint and the answer are to be taken as true.

For the purpose of the demurrer the allegations of the complaint referred to in the answer are to be treated as incorporated in it: *Cragin v. Lovell*, 88 N. Y. 258. And thus reading the answer, it does not set up a defense to the cause of action alleged in the complaint.

The judgment and order appealed from should be reversed and the judgment of the special term affirmed, with costs.

All concur, except Gray and Bartlett, JJ., dissenting, and Haight, J., absent.

PARTY-WALLS—DESTRUCTION OF.—In case a party-wall is destroyed by fire, there is no implied obligation to contribute toward rebuilding it: *Antomarchi v. Russell*, 63 Ala. 356; 35 Am. Rep. 40. The easement is at an end, for to hold otherwise would be to impose in perpetuity a servitude which was assumed for a specific purpose: See monographic note to *Bloch v. Isham*, 92 Am. Dec. 298. Where houses having a party-wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of the part on his ground: *Hoffman v. Kuhn*, 57 Miss. 746; 34 Am. Rep. 491.

PLEADING—DEMURRER AS AN ADMISSION.—Demurrers admit all facts properly alleged, and the sufficiency of the complaint must be decided upon the facts as alleged: *Bomar v. Means*, 87 S. C. 520; 34 Am. St. Rep. 772. A demurrer does not admit conclusions of law stated by the pleader, or the construction placed by him upon statutes: *McPhail v. People*, 160 Ill. 77; 52 Am. St. Rep. 806; nor facts which are in their nature improbable or impossible: *Southern Ry. Co. v. Covenla*, 100 Ga. 46; 62 Am. St. Rep. 812, and note.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

TULLIS v. RANKIN.

[6 NORTH DAKOTA, 44.]

EVIDENCE OF EXPERTS.—IT IS COMPETENT, FOR THE PURPOSE OF SHOWING MALPRACTICE, for a surgical expert, with the result of a surgical operation, performed nearly two years prior before him, either on his own personal examination and investigation of such result, or through a hypothetical question stating the result properly before him, to give his opinion as to the cause or causes producing the result.

M. A. Hildreth and J. A. Knauf, for the appellant.

E. W. Camp, for the respondent.

44 BARTHOLOMEW, J. This was an action for damages for malpractice in the amputation of a leg. There is but one question in ⁴⁵ the case, although presented in a variety of forms, and it is this: Is it legally competent, in order to show malpractice, for a surgical expert, with the results of a surgical operation performed nearly two years prior before him, either through his own personal examination and investigation of that result, or through an hypothetical question placing the results properly before him, to give an opinion as to the cause or causes that produced the results? The trial court held that it was not. We reach the opposite conclusion, while admitting that the question is close, and that authorities can be found that give support to the ruling of the trial court. The authorities are not uniform. Each case seems to have been ruled to some extent by its own attendant circumstances. Courts, as a rule, entertain an aversion to expert testimony, particularly medical and surgical expert tes-

timony, and experience no doubt warrants the aversion, yet it is well understood that expert testimony is often indispensable; cases must be decided upon that class of testimony. Its weight or lack of weight may often be matter of embarrassment for a jury, but courts ought not to exclude it for that reason. There are cases where a given result might be produced by so many different causes, and of so nearly equal probability, that it might be very difficult to assign the true cause. Yet where it is a matter that must be determined from scientific investigation and information, and from that only, it is difficult to see why a witness who has shown himself possessed of the requisite scientific knowledge should not be allowed to state what, in his opinion, was the cause of the effect. Of course, the weight to be given to the opinion might be but little, but a party ought to be permitted to present it. Other cases may arise where, from a scientific standpoint, a certain effect could be produced only from one cause. In such a case no one would question but that the scientist might be asked what, in his opinion, was the cause of the effect; and yet the inherent nature of the testimony is not different in the two cases. It differs only in the weight to be given to it. This view of the law would seem to be somewhat opposed to the views expressed ⁴⁶ in *Spear v. Hiles*, 67 Wis. 361. But that case does not purport to announce any general rule. Its facts were exceptional. It was an action for malicious prosecution, brought by a woman who had been arrested and imprisoned. By the expert testimony the plaintiff sought to establish a fact to augment her damages. The court held that it was not a proper element of damage, but also held that the expert could not give his opinion that a certain condition was the result of a certain cause, because it was common knowledge that so many other causes might have produced the same result. *Noonan v. State*, 55 Wis. 258, is also, perhaps, an authority in respondent's favor. *Hanselman v. Carstens*, 60 Mich. 187, cited by respondent, is not in point, as the court was then discussing a different question; and *Brant v. Lyons*, 60 Iowa, 172, also cited, is, we think, in appellant's favor. Rogers on Expert Testimony, at page 353, thus states the rule: "But an expert, speaking on a question of science, can be asked, in the presence of a given effect, of what causes it either was or might be the resultant. Such an inquiry is not regarded as speculative in any objectionable sense, but is a common and proper mode of examination." And in Lawson on Expert Evidence, 144, it is stated that the opinion of a medical expert

may be based upon his acquaintance with the party under investigation, on a medical examination of him which he has made, or upon an hypothetical case stated. And see, also, Omaha etc. Co. v. Brady, 39 Neb. 27; Louisville etc. Ry. Co. v. Holsapple, 12 Ind. App. 301; Moyer v. New York Cent. etc. Ry. Co., 98 N. Y. 645. These cases and many others show that when the facts are known, and have been testified to by the expert, it is not necessary to put an hypothetical question: See Rogers on Expert Testimony, 75, and cases cited. In this case plaintiff, who was in the employ of the Northern Pacific Railway Company, had his feet run over and crushed by the cars on May 5, 1893. On that same day his leg was amputated by defendant, and he was sent to the hospital at Brainard, Minnesota, where he remained for about two months. At that time the wound was not, and ⁴⁷ never was, entirely healed, until after the second amputation. The pain never left it, and at times was intense. Finally, in March, 1895, a second amputation was performed, and the limb healed, and all pain ceased. This second amputation was performed by Drs. Vidal, De Puy, and Morse. These gentlemen were severally sworn as expert witnesses for plaintiff. They testified in detail as to the condition of the limb and the patient at the time of the second amputation. After having so testified, each expert witness was asked: "What, in your opinion, was the cause of the condition in which you found the limb at the time you made the examination and amputation?" And to Dr. De Puy, an hypothetical question was put incorporating the facts to which plaintiff had testified as to his injury. The witnesses were not permitted to answer. It will be noticed that they were not asked whether or not some specified fact was not the cause. They were left free to assign whatever cause their judgment dictated. It may be conceded, however, that the ultimate object was to show that an improper or unskillful amputation was the cause of the condition. Certainly that was a probable cause. Other circumstances or events might have intervened, and produced the results. But the question did not ask for a mere possibility. We go no further than the facts of this case require. But these opinions, if given as anticipated, would have concluded nothing. They would have gone to the jury for what they were worth. It was still open to the defendant to show that the original amputation was skillfully and properly performed; still open to him to show that other circumstances and events influenced or produced the results; still open to him to show by other expert testimony, if he could, that the opinions

of plaintiff's experts were unwarranted in scientific surgery. But the questions as asked should have been answered.

Reversed, and a new trial ordered.

All concur.

WITNESSES — EXPERT TESTIMONY — PHYSICIANS AND SURGEONS.—The sphere of medical expert testimony is practically coextensive with the range of medical skill and science. In a suit for malpractice against a fellow-member of the profession, a medical witness may, upon a hypothetical statement of facts, it seems, state whether or not the facts as stated indicate such care and attention as the case demanded: See monographic note to *Hammond v. Woodman*, 66 Am. Dec. 235, 236. See *Kliegel v. Aitken*, 94 Wis. 432; 59 Am. St. Rep. 901, and note; *Grand Lodge v. Wieting*, 168 Ill. 408; 61 Am. St. Rep. 123, and note.

HARTZELL v. VIGEN.

[6 NORTH DAKOTA, 117.]

THE SUBJECT OF AN ACTION is not the property which has been seized under attachment issued therein, but is the cause of action which the plaintiff seeks to assert against the defendant.

PRACTICE.—A STATUTE REQUIRING AN AFFIDAVIT FOR THE PUBLICATION OF SUMMONS, to show that the court has jurisdiction of the subject of the action, is satisfied by an affidavit stating that the court has jurisdiction of the action.

JURISDICTION — CONSTRUCTIVE SERVICE OF PROCESS, WHETHER ATTACHMENT MUST PRECEDE.—It is not necessary, to support a judgment based upon constructive service of process, that any attachment should have been levied before the publication of summons was made. It is sufficient that such levy preceded the entry of the judgment.

JURISDICTION—GARNISHMENT AND CONSTRUCTIVE SERVICE OF PROCESS.—If a garnishment is levied before the entry of judgment, though no property is taken possession of thereunder by the officer, this is sufficient to support a judgment entered upon constructive service of process against a nonresident, if the garnishee has, before judgment, made a disclosure stating that he holds a number of promissory notes belonging to the defendant. The court thereby acquires jurisdiction to make all orders necessary to realize from the defendant's interest in the property.

Ball, Watson & Maclay, for the appellant.

Benton & Amidon, for the respondent.

120 BARTHOLOMEW, J. This action is based upon a promissory note executed by the defendant Vigen in favor of the defendant Rustad. The note represented a portion of the purchase price of a certain tract of land in Cass county, and, concurrently with the execution of the note, Rustad executed a contract for the sale of said land to the defendant Vigen.

It is alleged in the complaint that Rustad sold and transferred the note to plaintiff, and Rustad was made party defendant, and as to him a decree is asked confirming in plaintiff all Rustad's rights under the contract of sale ¹²¹ which, it is claimed, passed to the plaintiff by the purchase of the note, and as incident thereto. Both defendants answered, denying plaintiff's ownership of the note. This was the only issue tried below, and defendants prevailed. Plaintiff brings the case into this court.

We learn from the record that the plaintiff claims the ownership of the note by virtue of a purchase at execution sale in Hennepin county, in the state of Minnesota, which execution was issued upon a judgment entered in the district court of said county, in an action brought by one McKindly against the defendant Rustad. A duly authenticated transcript of the entire record in that case was offered in evidence by appellant, and, on objection, was excluded. From that record we learn that Rustad was not a resident of the state of Minnesota when sued there, but was a resident of this state. There was no personal service of summons, but service by publication was made, or, at least, attempted. There was no appearance, and judgment was taken by default. A writ of attachment was issued about the time of the commencement of the action, and a garnishee summons served upon the Washington Bank of Minneapolis. The disclosure of the garnishee showed that the bank held Rustad's note for over nine thousand dollars, on which over seven thousand dollars remained due and unpaid, and that as a collateral to this indebtedness, the bank held notes belonging to defendant Rustad to the amount of about twenty-two thousand dollars. Such subsequent proceedings were had in the case that all the collateral notes remaining in the hands of the garnishee after the indebtedness of Rustad to the garnishee was satisfied were sold on execution issued upon the judgment in favor of McKindly and against Rustad, and plaintiff herein became the purchaser at the execution sale. His title is assailed upon grounds which go to the jurisdiction of the district court of Hennepin county, in the state of Minnesota, to enter any judgment against the defendant Rustad. By stipulation in this case the statutes of Minnesota, as published in 1894, are to be treated as in the record. The first attack upon the judgment, and the one chiefly relied upon, ¹²² related to an alleged defect in the affidavit for publication of summons. Section 5204 of said Minnesota statutes specifies the cases wherein service may be made by publica-

tion, and what the affidavit must contain, and, among others, it provides: "3. When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action." In the case under consideration, the affidavit omitted the words "of the subject," making the allegation in that behalf read simply, "And the court has jurisdiction of the action." It is conceded that, in order to confer jurisdiction in this class of cases, all the statutory provisions relating to the publication of summons must be substantially complied with in every particular. Appellant insists that there was substantial compliance in this case, and that, for the purpose of this particular statutory provision, the two phrases, "jurisdiction of the subject of the action," and "jurisdiction of the action," are identical in meaning, and have reference only to the cause of action or controversy between the parties. Respondents insist upon a very different construction. They urge that all actions against nonresidents, where personal service within the state cannot be made, are, in their essential nature, actions in rem, and not in personam, and that the subject of the action is the res, which must be some specific property, which has been seized under a writ of attachment and brought under the control of the court, so it may by proper order be applied to the satisfaction of any judgment that plaintiff may obtain in the case. This, of course, requires that a writ of attachment be issued, and property seized thereunder, in every case under this subdivision, before an affidavit for publication of summons can properly be made. It is conceded by respondents, for the purposes of this point, that this was actually done in the Minnesota case. On the other hand, it is conceded by appellant that the jurisdiction must come through the allegations of the affidavit. It thus becomes necessary for us to place a construction upon the subdivision of the Minnesota statute above quoted. It would have afforded us immediate relief could we have found a construction ¹²³ of the language by the very able supreme court of that state. But the point seems not to have been raised there. Indeed, the authorities bearing directly upon the point are very few, and not always satisfactory. We have, however, the same statute in this state, borrowed, as was the Minnesota statute, from the New York Code of Civil Procedure of 1849. It must be conceded, in discussing this proposition, that to construe the words "subject of the action" to mean specific property that has been seized in the action would be, perhaps, in the interests of an orderly and logical practice; that it would more nearly

title here. He claims the right to have that property appropriated to the payment of an alleged debt due him from the defendant. But this right is neither questioned nor questionable, if his right to maintain this proceeding is conceded. The subject of the action is the claim therein asserted by him, and the satisfaction of which he seeks out of the property attached, which he concedes to belong to the defendant: See the opinion of Hand, J., in the case of the Bank of Commerce v. Rutland etc. R. R. Co., 10 How. Pr. 8. On the argument the plaintiff referred to the case of Ready v. Stewart, 1 Code R., N. S., 298, as sustaining the ¹²⁶ position in question. But I do not so understand the opinion of the learned judge who delivered the opinion in that case. He says the term 'subject of the action' relates to the nature of the action, or the 'thing' sought to be obtained by the judgment to be given, but not at all to the 'person of the defendant.' The learned judge was commenting upon the third subdivision of section 135 of the code, which requires that, in the case of a nonresident defendant who has property in the state, and the action arises on contract, the court should have jurisdiction of the subject of the action. Now, the thing sought to be obtained by the judgment was the establishment of the claim asserted in the action. The idea that the learned judge was combating was, as I understand his language, simply that the term 'jurisdiction of the subject of the action' did not mean jurisdiction of the defendant." In this language is contained a suggestion that is not always kept in view. It is as to the difference between the terms "jurisdiction of the subject of the action" and "jurisdiction of the action." The latter, in its usual acceptance, means complete jurisdiction—jurisdiction both of the subject of the action and of the parties to the action. Hence, the terms are not synonymous, and cannot be used interchangeably. The former may exist, and the latter not. But the latter cannot exist without the former, since it necessarily includes the former. Now, the affidavit under consideration declared that the court had "jurisdiction of the action," which necessarily included the jurisdiction of the subject of the action. That much the statute required it to contain, and the fact that it contained something more, which the statute did not require, does not affect its efficiency as an affidavit under the statute.

In the light of the above quotation from 18 Howard's Practice, we wish to discuss another position maintained by respondent with much confidence. Subdivision 5 of the section of the Min-

nesota statute, providing cases in which service may be made by publication, reads: "When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest therein," et cetera. Here, it is urged, it is clear that the ¹²⁷ subject of the action is specific tangible property, and that the same words used in another portion of the same section must have the same meaning. But wherein lies the difference? In cases arising under subdivision 3 there is no controversy concerning the attached property. Plaintiff, by attaching it, declares it to be the property of the defendant, and he can reap a benefit from it only in case it is the property of the defendant. Both parties are interested in declaring it to be defendant's property, and controversy is impossible. In cases arising under subdivision 5, the whole controversy centers on the property. Each party claims title or interest therein, each adverse to the other. Every issue presented by the pleadings relates to the property. It is the thing about which the controversy arises, just as the contract is the thing about which the controversy arises under subdivision 3. But, were this otherwise, we could concede that a phrase used in chancery proceedings, in actions relating exclusively to specific property, and seeking specific relief, must be given the same meaning when used in law actions, based on contract, and seeking a money judgment only. Again, it is urged that if the term "subject of the action" means the controversy involved, then the term had no place in the statute, because it was also necessary to state that the action arose on contract, and, as courts of general jurisdiction had jurisdiction of all actions on contract, it was entirely unnecessary, after stating that the action arose on contract, to also state that the court had jurisdiction of the controversy. Granting this to be so, equally unnecessary expressions are frequently found in the statutes. But we think the premise unsound. Without having examined in detail as to the constitution of the courts in New York when the statute was adopted, there were at least the supreme court, the superior court of the city of New York, and the court of common pleas for the city and county of New York, all of which had jurisdiction in all or some cases arising on contracts, but their jurisdiction was not entirely concurrent. And in Minnesota, when the statute was adopted, the district courts were without jurisdiction in certain cases ¹²⁸ arising on contracts, the jurisdiction of justice courts being exclusive where the amount in controversy did not exceed one hundred dollars. See *Castner v. Chandler*, 2 Minn. 86. The

same is true now. See Minn. Const., art 6, sec. 5. These facts render the provision strictly necessary.

The case of *Pennoyer v. Neff*, 95 U. S. 714, furnishes the groundwork for much of the respondents' contention in this case. But no point was decided in that case that can aid respondents. The facts were that the state court of Oregon had rendered a personal judgment against a nonresident nonappearing defendant, served by publication only. A general execution was issued upon the judgment, and certain lands of the execution defendant were sold, and the purchaser put in possession. Subsequently an action was brought in the federal court by the execution defendant against the purchaser to regain possession. The case turned upon the validity of the judgment in the Oregon state court. In the federal supreme court the case received exhaustive consideration, and it was authoritatively announced that no state court had the power to enter a personal judgment against a nonappearing nonresident defendant, served by publication only. These principles, there announced, and which are now universally accepted as sound, rest upon the broad grounds that every sovereign state possesses exclusive jurisdiction over persons and property within its territory, and may properly determine for itself the status and capacity of its inhabitants, and may prescribe all rules for the acquirement and transfer of property, and for the execution and enforcement of contracts, within such territory; but that the writs and processes of a state court can have no extraterritorial force or binding effect. They cannot reach beyond the territorial lines of the state where issued, and directly affect persons or property in another state. It being certain, then, that no valid judgment in personam could be rendered in the case, it followed that no valid judgment whatever could be rendered, unless it was in the nature of a judgment in rem. But, to authorize a judgment in rem, some process of the court must have ¹²⁹ been served upon the res, and it must have been brought within the direct control of the court, so that the judgment could direct its final disposition. The court declares that a judgment cannot occupy the uncertain position of being valid in case property of the defendant is subsequently seized in the state, or, failing in that, forever remain invalid, and that a judgment, if void when rendered, will forever remain void. This unanswerable argument leads inevitably to the conclusion that, in all actions against nonresident nonappearing defendants, served by publication only, property of the defendant must be seized before any valid judgment can

be rendered. As said by the court in that case, the jurisdiction to investigate the controversy depends upon jurisdiction over property. There is no jurisdiction in personam, and, unless there is jurisdiction in rem, the action must go down. The learned counsel admit that it is only by inference that *Pennoyer v. Neff*, 95 U. S. 714, can assist respondents in this case. But it is argued that, by the commencement of an action against an avowed nonresident, no personal judgment is expected, and that, while the action is begun in personam, it is necessary for plaintiff to at once proceed as in an action in rem; and admiralty works are cited to show that, in actions strictly in rem, the first step is to seize the property to be affected. But this was not an action in rem. It was begun as an action in personam, and no one could say that it would be anything but an action in personam until there had been completed service, and the time for answering had expired. The law could not compel defendant to come in and defend, but it had extended to him every opportunity to do so that it could, and no one was warranted in saying that he would not do so until, by his failure, he so declared. As said in *Cooper v. Reynolds*, 10 Wall. 308, and quoted with approval in *Pennoyer v. Neff*, 95 U. S. 714: "But if there is no appearance of defendant, and no service of process upon him, the case becomes, in its essential nature, a proceeding in rem." But what obligation rested upon plaintiff to invoke the jurisdiction in rem until it was ¹³⁰ certain that jurisdiction in personam would not be acquired? True, when that time arrives, he must invoke the jurisdiction in rem, or suffer his action to fail. But we perceive no reason why he should sooner do so.

But, lastly, upon this point, it is urged—and there is reasoning *arguendo* in *Pennoyer v. Neff*, 95 U. S. 714, that suggests this line of argument—that the law assumes that property is in the possession of the owner, either in personam or by agent, and that, hence, he will have actual notice of its seizure, and can rush to its defense; but that a statute that requires only that property should be seized before judgment would be satisfied with a seizure one hour before judgment, and thus property would be taken without giving the owner any opportunity to be heard, or, in other words, "without due process of law." We think this reasoning places undue stress upon the fact of seizure, and loses sight of the effect of substituted service. Such service the law authorizes and recognizes. It will sustain no personal judgment—can serve as the basis of no personal liability; but for all other purposes it is effective. The law is careful

to conserve the rights of nonresident defendants. It provides that notice shall be published for a specified time, usually six weeks, and in the newspaper in the proper jurisdiction most likely to give defendant notice. It requires a copy of the summons and complaint to be sent to him when his address is known. All this is not mere idle form. It serves a substantial purpose. It is the theory of the law that notice of the pendency of the action is thus brought to the defendant, and only by the grace of permissive statutes is he permitted to deny it. And, when notice is thus received, he may be justified in disregarding it, so far as incurring any personal liability is concerned; but he is not justified in treating it as an entirely unwarranted assumption of power by a foreign court. He is bound to know the law, and he is bound to know that, if he have property in the jurisdiction, it can and will be seized in the action, unless he appears and incurs the liability of a personal judgment. It is, in effect, a modified form of the ¹³¹ old writ of distringas. A nonresident defendant, so served, is not compelled to appear; but he refuses at the risk of having his property seized and appropriated, not for the benefit of the state, as in the old writ, but for the benefit of the plaintiff. The writ of attachment, when used against a nonresident, is not necessarily or ordinarily used for the same purpose that it serves in case of a resident defendant personally served. There its object is to secure an insecure or jeopardized claim. But it may be that a personal judgment against the nonresident would be perfectly good, and all that plaintiff could desire. He uses the attachment to force the nonresident defendant either to submit to the chances of a personal judgment or suffer his property to be appropriated. It is the substituted service that gives notice of the pendency of the action, and that notice is a direct challenge to the defendant to appear and protect his property, if any he have in the jurisdiction. He has ample time. There is no legal hardship. The New York rule of court did not require any specified time before judgment at which property should be seized. Neither does *Pennoyer v. Neff*, 95 U. S. 714, nor any other adjudicated case. *McKinney v. Collins*, 88 N. Y. 216, is also relied upon by respondents. There is language in that case which, standing alone, and disconnected with the facts, would strongly support respondent's contention. The case, in all its essential features, was a duplicate of *Pennoyer v. Neff*, 95 U. S. 714. The court followed that case, and went no further; but, in the opinion, the statutes of New York relating to publication of summons

and the jurisdiction acquired thereby were discussed at length, and reasoning used which would seem to indicate that the attached property was the subject of the action. But the question was not in the case, and we do not think it was in the mind of the able jurist who wrote the opinion, because, after discussing the statutes and the New York decisions, none of which fairly met the point, he says: "I think, however, that the understanding of the courts having jurisdiction over such questions must be deemed to be expressed in the rule adopted by the judges, in 1858, when—making provision for carrying the statutes above referred to ¹⁸² into effect, and not enacting any new law, for this was beyond their power—they provided by rule 25 that," et cetera; quoting the rule already set out in this opinion. It seems clear that the writer did not intend to give the statute any construction that would violate that rule. Thus viewed, the opinion is in entire harmony with what we have said. That such was the view of the decision taken by the court itself, see dissenting opinion of Earl, J., in *Bryan v. University Pub. Co.*, 112 N. Y. 382. The only case we find, since *Pennoyer v. Neff*, 95 U. S. 714, where the points here raised were squarely decided, is *Iowa State Bank v. Jacobson*, 8 S. Dak. 292, and that case is directly against respondents, and in full accord with what we have said. The statute in question has been in force for nearly fifty years. It has been in practically universal operation in the United States for more than a quarter of a century, yet no court of last resort has ever given it the construction contended for by respondents, so far as our investigation can discover. The general, and, we believe, almost uniform, practice has been the other way. Property rights had been everywhere founded upon this practice. However desirable the practice contended for by respondents might be, it must come, if it come at all, from the legislature. Courts cannot, at this late day, torture it out of the existing statute.

One more point is presented in the brief. It is this: Granting the sufficiency of the affidavit for publication, it is contended that the record offered in evidence shows that no property of the defendant was in fact seized before the entry of judgment. The basis of the claim is the fact that the attachment was by garnishment, the garnishee summons being served upon a bank. The disclosure of the garnishee, made before judgment, showed that it held a large amount of notes belonging to the defendant, and which had been transferred to it by the defendant as collateral to his indebtedness to the bank, which at that time amounted to

about one-third of the face value of the collateral notes. Section 5312 of the Minnesota statute reads: "No person or corporation ¹⁸⁸ shall be adjudged a garnishee in either of the following cases, viz.: 1. By reason of any money or any other thing due to the defendant, unless, at the time of the service of the summons, the same is due absolutely, and without depending upon any contingency." It may be conceded that, under this provision, no judgment could at that time have been entered against the garnishee, requiring it to deliver the notes or any part thereof. But that was not the question. Was there any property of the defendant within the jurisdiction of the court? In other words, had the court jurisdiction in rem? If so, it had jurisdiction to render a judgment, to the satisfaction of which the property then before the court might ultimately be applied. We think this is reasonably clear. The defendant owed the notes subject to the lien of the garnishee. Or, to put it more favorably for respondents, the defendant's interest in the notes was an equity of redemption. But, under section 6842 of the General Statutes of Minnesota, an equity of redemption is clearly property, and, being property, is subject to levy. Whatever steps it may be necessary to take in order to realize upon the property cannot affect the validity of the levy. The court has the power to make all necessary orders to that end, as was in fact done in this case. We think the court had full jurisdiction to render a valid judgment in rem.

It follows that the record of the judgment of the district court of Hennepin county, Minnesota, when offered in evidence, was not vulnerable to the objections urged. Its rejection was error, which necessitates a new trial in the case, and it is so ordered.

Reversed.

Wallin, C. J., concurs.

JUDGE CORLISS DISSENTED. He maintained, first, that the affidavit for the publication of the summons in Minnesota was fatally defective in not stating that the court had jurisdiction of the subject of the action; that the subject of the action related to the property brought within the control of the court, and not to the claim on which it was based; that the proceeding, where the defendant was a nonresident, though nominally in personam, was in substance in rem; that there could be no proceeding against the property until it had been brought within the control of the court by its seizure; that therefore such seizure should precede the service of the summons at least until the statute conferred authority to serve summons first and seize property afterward.

JURISDICTION.—THE SUBJECT MATTER OF A SUIT, when reference is made to matters of jurisdiction, means the nature of the cause of action and the relief sought: *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 866.

PROCESS—PUBLICATION OF—SUFFICIENCY OF AFFIDAVIT.—An order for publication of summons must be based upon an affidavit by plaintiff showing affirmatively an existing cause of action against defendant; otherwise, the court acquires no jurisdiction over the defendant: *Beckett v. Cuenin*, 15 Colo. 281; 22 Am. St. Rep. 399, and note. In such a case, it is not necessary to show that an attachment has issued against his property: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34. See *Long v. Fife*, 45 Kan. 271; 23 Am. St. Rep. 724.

JUDGMENT AGAINST NONRESIDENT SERVED WITH PROCESS BY PUBLICATION—ATTACHMENT NECESSARY.—If a nonresident is not personally served with process within the state, and does not appear in the action, no valid personal judgment can be entered against him, unless his property is attached in the action, and the effect of such judgment is restricted to the property attached: *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314; *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34.

CORNWELL v. FRATERNAL ACCIDENT ASSOCIATION,

[6 NORTH DAKOTA, 201.]

CRIME—ATTEMPT TO COMMIT.—One who is hunting for prairie chickens, out of season, and with intent to shoot them, armed for that purpose, is not guilty of the attempt to kill such chickens.

INSURANCE—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.—One who is hunting for game in the ordinary manner is not guilty of voluntary exposure to unnecessary danger, so as to preclude his recovery if injured by the accidental discharge of such gun, brought about by his foot slipping while he is climbing a bank and his drawing himself up by means of a limb.

T. A. Curtis, for the appellant.

P. H. Rourke, for the respondent.

202 CORLISS, J. From a judgment in favor of the plaintiff, based upon a verdict in his favor directed by the court, the appeal in this case was taken. The object of the action was to recover the amount due under an insurance policy issued by defendant to the plaintiff. Among other provisions, the policy contained one entitling the plaintiff to one thousand dollars for the loss of a hand through external, violent, and accidental means. The plaintiff lost his left hand by the accidental discharge of a gun he was carrying. Only two defenses are relied on. The facts do not appear to be in controversy.

It is first urged that the plaintiff was injured while violating the laws of this state. The policy declares that it does not cover

injuries resulting wholly or partly, directly or indirectly, from violating rules or laws of a corporation. We shall assume, for the purposes of this case, that this language embraces the laws of this state, and does not relate solely to laws of a corporation, and rules of a corporation, as is contended by counsel for the plaintiff. What law of this state, then, was the plaintiff engaged in the violation of at the time he was injured? He had started out with his loaded gun for the purpose of killing prairie chickens. To have killed them at that season of the year (it being December 12th) would have been a violation of chapter 69, of the Laws of 1891. But the plaintiff was not engaged in the killing of anything at the time the accident occurred. He was climbing a bank, and, his foot having slipped, he caught hold of a limb, and was in the act of drawing himself up by means thereof, when in some way the gun was discharged, the contents lodging in his left hand, shattering it so terribly that amputation was necessary. The only possible ground on which it can be claimed that the plaintiff was violating the laws of this state at the time the gun was discharged, and that the injury he sustained resulted from such violation, is that he was guilty of attempting to kill prairie chickens. Under provision of sections 7693 and 7694 of the Revised Codes, an attempt to commit a crime is of itself a substantive offense. Section 7693 declares that "an act done with intent to commit a ²⁰³ crime, and tending but failing to affect its commission, is an attempt to commit that crime"; and section 7694 provides that "every person who attempts to commit a crime and in such attempt does any act toward the commission of such crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows," et cetera. It is too clear for discussion that, at the time the plaintiff was injured, he had not done any act tending to effect the commission of the offense of killing prairie chickens out of season. Intent had ripened into preparation. But the plaintiff had not, in deeds, passed beyond the point of preparation, and entered upon the execution of his criminal project. It is impossible to formulate a rule which will constitute an unerring guide in assigning to cases which occupy the debatable ground their respective places upon one side or the other of the line which separates preparation from legal attempt. The question must, from its very nature, always remain difficult of solution. The wisest course for tribunals to pursue with respect to it is to deal with each cause as it arises,

in the light of a few general principles applicable to such cases. We shall content ourselves with the statement of our conclusion that the plaintiff had not, within the meaning of our law, attempted the killing of prairie chickens, although he had formed the purpose to shoot them, and had made preparations to accomplish such object. The authorities fully sustain our view: *Mulligan v. People*, 5 Park. 105; *State v. Clarissa*, 11 Ala. 57; *Hicks v. Commonwealth*, 86 Va. 223; 19 Am. St. Rep. 891; *Stabler v. Commonwealth*, 95 Pa. St. 318; 40 Am. Rep. 653; *State v. Butler*, 8 Wash. 194; 40 Am. St. Rep. 900; *People v. Murray*, 14 Cal. 159; 1 Bishop's Criminal Law, secs. 760, 762, 764; *Regina v. Cheeseman*, 9 Cox C. C. 103; *Regina v. Taylor*, 1 Fost. & F. 511.

The second ground of defense is, that the plaintiff voluntarily exposed himself to unnecessary danger. The policy provides that it shall not cover such injuries as result from voluntary exposure to unnecessary danger. There is no merit in this defense, under the facts of this case. It will hardly be insisted ²⁰⁴ that one who, in the ordinary way, hunts for game, has by such an act exposed himself to unnecessary danger, within the meaning of such a provision in an insurance policy. Nor can it be said that the plaintiff voluntarily exposed himself to unnecessary danger by essaying to scale the bank, or by attempting to draw himself up the bank with his left hand, while the loaded gun was held in his right hand. We cannot say that this act was one which reasonable men would pronounce dangerous. To go through a dense thicket with the hammer of a gun raised, and the muzzle pointed toward one, would be to voluntarily expose oneself to unnecessary danger. But no reasonably prudent man would have deemed it probable, or even possible, that injury would result from scaling a bluff with a loaded gun in hand. The danger was a hidden danger. No one can be said to have voluntarily exposed himself to unnecessary danger when no hazard is visible to an ordinarily prudent man. He would justly be chargeable with having voluntarily exposed himself to unnecessary danger who should essay to leap a wide and deep chasm. But no such charge could be laid at the door of one who, in the night, should unexpectedly walk into an unprotected ditch. The authorities fully sustain our ruling upon this point: *Keene v. New England etc. Assn.*, 161 Mass. 149; *Jones v. United States etc. Assn.*, 92 Iowa, 652; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205; *Equitable etc. Ins. Co. v. Osborn*, 90 Ala. 201; *Miller v. Insurance Co.*, 92 Tenn.

167. See, also, 1 Am. and Eng. Ency. of Law, 2d ed., 309; May on Insurance, sec. 409; Manufacturers' Indemnity Co. v. Dorgan, 7 C. C. A. 581; 58 Fed. Rep. 945; Follis v. United States etc. Assn., 94 Iowa, 435; 58 Am. St. Rep. 408; Providence etc. Investment Co. v. Martin, 32 Md. 310; Marx v. Travelers' Ins. Co., 39 Fed. Rep. 321; Sutherland v. Standard etc. Ins. Co., 87 Iowa, 505.

The judgment of the district court is affirmed.

All concur.

CRIMINAL LAW—ATTEMPT TO COMMIT CRIME—WHAT IS. It is difficult to define the word "attempt" as used in criminal jurisprudence. An attempt to commit a crime involves a guilty intent, but it implies something more than a mere intention to commit the crime. The law will not punish a criminal intent until some overt act is done in the endeavor to carry out the previously formed intention. Mere preliminary preparations do not constitute such overt act: See monographic note to *People v. Moran*, 20 Am. St. Rep. 741, 742.

INSURANCE—LIFE.—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER means intentional exposure to such danger: *De Loy v. Traveler's Ins. Co.*, 171 Pa. St. 1; 50 Am. St. Rep. 787. If the danger was obvious, the exposure to it voluntary and unnecessary, and the death of the insured ensued in consequence, the case may be fairly held to be within the exception in the policy: Extended note to *Travelers' Ins. Co. v. Jones*, 12 Am. St. Rep. 272-274.

STANDARD OIL COMPANY v. ARNESTAD.

[6 NORTH DAKOTA, 255.]

SURETIES FOR A FIRM—LIABILITY OF AFTER ITS DISSOLUTION.—Sureties who become such to secure an obligee for a loss or misappropriation of funds of a firm consisting of A and B, or either of them, or anyone to whom they shall intrust the business of such obligee, are not liable after the dissolution of the firm for the acts and defaults of the member who retains and continues to conduct the business, though the obligee is not aware of the dissolution of the firm.

M. A. Hildreth, for the appellant.

F. W. Ames, for the respondent.

²⁵⁵ **CORLISS, J.** The object of this suit is to hold the defendants, as sureties upon a bond, liable for the embezzlement of one of the principals in such obligation. The Standard Oil Company, the plaintiff herein, having selected as its agents at Mayville, in this ²⁵⁶ state, the firm of Arnestad & Eggerud, required of them a bond with sureties as a condition of shipping them its goods, to be handled by them as such agents at that

point. In response to this demand, the bond in suit was executed by the firm, and by defendants Hanson and Gullicks as sureties. The sole question before us relates to the liability of the sureties. Their only defense is, that the bond secured the honesty of only the firm, and that before the embezzlement in question took place Eggerud had withdrawn from the firm, and that at the time the money sued for was misappropriated the business of such agency was being carried on by Arnestad & Lindstrom. As the construction of the bond is involved, we deem it necessary to quote it in full: "Know all men by these presents: That we, Mike Arnestad and Ole Eggerud, copartners as Arnestad & Eggerud, principals, and John P. Hanson and C. Gullicks, sureties, are held and firmly bound unto the Standard Oil Company in the sum of five hundred (\$500) dollars, lawful money, to be paid to the Standard Oil Company, its executors, administrators, and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, severally and collectively, firmly by these presents. The condition of the above obligation is such that if, through the neglect, carelessness, or inattention to the business of the said company by the said Arnestad & Eggerud, or either of them, or any of their employes to whom they may intrust the business of the said company, the company shall sustain any loss, or damage, then the said Arnestad & Eggerud, and parties hereto subscribed as sureties, shall indemnify the said company to the amount of this bond; and the subscribing parties also firmly bind themselves to sustain and pay the Standard Oil Company, not to exceed the amount of this bond, any loss resulting to the said company through the theft or fraud on the part of the said Arnestad & Eggerud, or anyone to whom they may intrust the business of the company. The direct purpose of this bond is to secure and indemnify the said company against any loss from shortage on account of stock not being properly accounted for, ²⁵⁷ and loss on account of funds belonging to the said company being misappropriated by the said Arnestad & Eggerud, or either of them, or anyone to whom they shall intrust the business of the said company. If the said Arnestad & Eggerud shall faithfully and accurately perform the duties as agents for the Standard Oil Company, and shall correctly account for all stocks or funds belonging to the said company which shall be intrusted to him or his employes acting in his stead, whose acts he herein directly assumes, then the above obligation to be void; otherwise to remain in full force and virtue."

It is urged that by the use of the words "or either of them" the parties intended to cover the individual defalcation of either member of the firm as well after the dissolution of the firm as before. But we are unable to discover any justification for such a construction of the instrument. We think that these words were employed (unnecessarily employed, it is true) to express what the law would have implied had they been omitted; i. e., that both partners need not join in the wrongful act to render all parties to the obligation liable. The bond was given to secure the plaintiff from loss growing out of the agency held by the copartnership, and there is nothing in its language to indicate that the parties were contracting with reference to a possible dissolution of the partnership and the continuance of the agency by one of the firm. Other provisions of the bond indicate the exact reverse. The instrument declares that "the subscribing parties also firmly bind themselves to sustain and pay to the Standard Oil Company, not to exceed the amount of this bond, any loss resulting to the said company through the theft or fraud on the part of said Arnestad & Eggerud, or anyone to whom they may intrust the business of the company," Again, the bond provides that: "If the said Arnestad & Eggerud shall faithfully and accurately perform the duties as agents for the said Standard Oil Company, and shall correctly account for all stock or funds belonging to the said company which shall be intrusted to him or ²⁵⁸ his employes acting in his stead, whose acts he herein directly assumes, then the above obligation to be void," et.cetera. It is evident that the words, "to him or his employes acting in his stead, whose acts he herein directly assumes," were intended to express the plural instead of the singular. In preparing the bond, a blank was probably used which had been so worded as to apply to a single agent. Looking at the whole instrument, and interpreting it in the light of surrounding circumstances, we are unable to find in it any purpose on the part of the obligors to give, or on the part of the obligee to exact, security for the act of either partner after the partnership as such had ceased to act for the plaintiff. Had this been the object of the parties, an explicit provision to that effect could, and certainly would, have been incorporated in the bond. We are therefore forced to fall back upon the inquiry whether the law will imply any promise on the part of the sureties to be responsible for Arnestad's honesty after he had ceased to be associated with Eggerud in the business. On this point we have no doubt. A surety who engages to be responsible for the honesty of a firm

may be entirely influenced by the consideration that one of the partners is a man of integrity, and of such strength of character, and such shrewdness and watchfulness in business affairs, that the risk of dishonesty from the action of the other partner, in whom the surety may place no trust, is reduced to the minimum. The sureties in this case may have been willing to become bounden for the fidelity of Arnestad & Eggerud while acting as a firm, and yet at the same time not willing to incur the hazard of obligating themselves as sureties of the partner Arnestad alone. Based upon such considerations as these, the rule of law has long been established that the surety, standing upon the very letter of his contract, may insist that he cannot be held for aught that is done after the dissolution of the firm, for which alone he became responsible: *Backhouse v. Hall*, 6 Best & S. 507; *Dupee v. Blake*, 148 Ill. 453; 2 Bates on Partnership, sec. 648-655; *Burch v. De Rivera*, 53 Hun, 367; 6 N. Y. Supp. 206. See, also, *Penoyer v. Watson*, 16 Johns. 100; *Crane Co. ²⁵⁹ v. Specht*, 39 Neb. 123; 42 Am. St. Rep. 562; *Manhattan Gaslight Co. v. Ely*, 39 Barb. 174; *White Sewing Machine Co. v. Hines*, 61 Mich. 423; *Barnett v. Smith*, 17 Ill. 565; 24 Am. & Eng. Ency. of Law, 764, 765. The case of *Dupee v. Blake*, 148 Ill. 453, so far as the principle of law is concerned, presents the same features as the case at bar. The court there said: "The rule is, that if a surety engages for an individual, the engagement is understood to extend to the acts of the individual alone, and will not continue if he takes in a partner; in other words, the surety for an individual is not liable for a partnership of which he is a member. A surety who guarantees that a firm composed of particular individuals will do certain acts or discharge certain duties, cannot be held liable where there is a change in the firm, although the firm name is not changed. As a surety's liability is strictissime juris, and cannot be extended by construction, his guaranty to a partnership is extinguished if any partner is taken into or retires from the partnership, unless it appears from the terms of the instrument that the parties intended the guaranty to be a continuing one, without reference to the composition of the firm. A party may be induced to become surety for the individuals who compose the firm, because of his confidence in their integrity, prudence, accuracy, and ability as business men; but he cannot be presumed to have intended to become responsible for the possession of such qualities by some third person who may afterward be taken into the firm without his knowl-

edge or consent. It is often in the power of one partner, by want of discretion and integrity, to ruin another."

Our attention has been called to certain decisions which it is urged with great earnestness are opposed to the authorities already cited, and we are requested to follow them as enunciating the sounder doctrine. These decisions are *Palmer v. Bagg*, 56 N. Y. 523; 64 Barb. 641; *Hayden v. Hill*, 52 Vt. 259. But, in our judgment, these cases are plainly distinguishable from the case before us for final settlement. Their facts were different from the facts of this controversy in vital particulars. The sureties there had ^{also} become responsible for the honesty of an individual agent. As the court very properly held, such sureties took the risk, not only of their principal's dishonesty, but also of the dishonesty of those whom he might employ in any capacity to assist him in the prosecution of the business of the agency. Should he hire a subagent as an assistant, the sureties would still be bound. And so they would remain liable if he should see fit to give such assistant an interest in the profits of the business of the agency, provided the obligee did not deal with the new firm as agents, and thus extinguish the original agency. The sureties in those cases undertook to guarantee the fidelity of the agent to his trust, and therefore necessarily agreed to be responsible for whatever he should do himself or through his agents and employes. They agreed to assume the risk of his integrity and his business judgment in employing assistants in any capacity. It is upon this ground that all these decisions relied on by counsel for plaintiff proceed. In *Hayden v. Hill*, 52 Vt. 258, the court said on this point: "1. The report shows that Mitchell took in one Clapp as a partner, and that said agency was managed, and funds therefor received, during a portion of the time, by the partnership; and it is claimed that a portion of the funds from sales and leases of the property were received by Clapp, and never actually came into the hands of Mitchell. But the report further states that the plaintiff never recognized such partnership, and dealt solely with Mitchell. He refused even to receive a note indorsed by the partnership name. If the plaintiff had seen fit to have consigned the property to the partnership, and dealt with it in such a manner that the firm of Mitchell & Clapp would have been the responsible parties in the accounting, these defendants, as sureties for Mitchell on the bond, could not be liable to respond for the laches of the firm, for it would be the default of a different party from that for which they were bound. Mitchell was at liberty to employ such

agency as he choose to assist him. He could pay assistants a stipulated salary, or compensate them with a portion of the profits of the business. It was a matter of indifference to ²⁶¹ the plaintiff, so long as Mitchell fulfilled all the stipulations of the agreement. If he employed unfit agencies, and thereby the property was squandered and lost, it was, so far as this plaintiff is concerned, the default of Mitchell alone, and he and his sureties must respond. If the fact that defendant took in a partner in conducting the business of the agency did enhance the risk of these defendants, as the sureties of Mitchell, it was not induced or recognized by plaintiff, and was a matter over which the defendants had quite as much control as the plaintiff. We think that the referee was right, under the circumstances of the case, in finding that Mitchell was 'responsible for the acts of Clapp,' as for any other agent or assistant that he employed, in conducting the business of the agency; and that money that came to the hands of Clapp in the conduct of the business by legal intendment came to the hands of Mitchell." And in *Palmer v. Bagg*, 56 N. Y. 523, 64 Barb. 641, the court said: "We do not think this sufficient to change the relations between Fanning and the plaintiffs. The latter did no act creating or recognizing any change. The agencies or means which Fanning employed to dispose of the machines after receiving them did not necessarily interfere with the relations between him and the plaintiffs. He might employ other persons to aid in the selling, and pay them wages or a percentage, or a share of profits as partners. So long as the plaintiffs confined their dealings with him under the power of attorney, they would not be affected by any arrangements he should make." In neither of these cases did it appear that the obligee had dealt with the firm. Had this appeared, a different question would have been presented, for then the sureties could have claimed that their bond did not cover a partnership agency, but only an individual agency. And it is apparent from the language of the courts in these cases that this fact would have constrained them to hold that the sureties were not liable.

Finally, it is said that it does not appear that the plaintiff knew of the withdrawal of Eggerud from the firm, and that hence it follows that the old firm, as a firm, was still liable to the plaintiff ²⁶² for the funds misappropriated, no matter by whom they were embezzled. Upon this foundation plaintiff builds up the argument that, inasmuch as the principals in the bond are liable, so are the sureties. But this reasoning entirely misap-

prehends the nature of the obligation of the sureties in this case. By signing the bond, they did not, in effect, assert to the plaintiff that they would be bound whenever the principals in the bond were liable in any way to the plaintiff, whether because of their having embezzled the property, or by reason of the doctrine of estoppel which would seal their lips against a denial of liability. They merely agreed to become responsible for the fidelity of the firm so long as each of the members of the firm should remain in the business. They contracted to be bound for the acts of Arnestad so long as they could have the protection resulting from the association of Eggerud with him in the same business. But they did not guarantee the integrity of Arnestad alone, unwatched and influenced by Eggerud, who may have been the only person in whom they reposed any trust. If the plaintiff was ignorant of the change in the firm, so were the sureties; and, if the sureties have a right to stand upon the terms of their contract, then it behooved the plaintiff to ascertain at its peril whether all the persons for whom the sureties had become responsible still remained at the helm of the business of the agency. On this point the decision of the court in *Burch v. De Rivera*, 53 Hun, 367, 6 N. Y. Supp. 206, is decisive. The court there said: "The fact that plaintiffs were not notified of the change is immaterial. They may have an action against the firm as it existed before the change, because of a failure to notify them of the change, or to publish the notice of dissolution. That proceeds on another principle—presumption attached to continued firm dealings without notice. The guarantor is not responsible for a state of facts which might justify a recovery against the original members. There is no evidence that he was aware of the change. He seems to be as much without notice as the plaintiffs. But, were it otherwise, we may say, in the language ²⁶³ of Lord Blackburn, 'nothing is stated to show that the defendant was under obligation to inform the plaintiff banking-house of the fact, or that he took steps to conceal it. At all events, his contract is to guarantee a copartnership composed of certain persons, and that contract cannot be altered or extended without his consent': See, also, *Backhouse v. Hall*, 6 Best & S. 507.

We are unable to agree with counsel for plaintiff that there is not sufficient evidence of the dissolution of the firm of Arnestad & Eggerud. The evidence on the point is very satisfactory. Nor do we find anything in the case to rebut it. The deficit sued for having resulted from misappropriation of funds by

Arnestad after Eggerud had retired from the business, the district court was right in rendering judgment for the sureties on the bond.

It follows that such judgment must be affirmed, and it is so ordered.

All concur.

SURETYSHIP—DISCHARGE OF SURETY.—The obligation of a surety is not to be extended beyond the terms of his contract strictly interpreted: Extended note to Scott v. Fisher, 28 Am. St. Rep. 691, 692; Salem v. McClintock, 16 Ind. App. 656; 59 Am. St. Rep. 330, and note.

FIELD v. GREAT WESTERN ELEVATOR COMPANY.

[6 NORTH DAKOTA, 424.]

ELECTION BETWEEN INCONSISTENT REMEDIES.—One having a right to appeal to either of two courts, on appealing to one of them, irrevocably elects to pursue his remedy and cannot afterward appeal to the other. He cannot dismiss the appeal taken and then resort to an appeal to the other court.

Edward Engerud, for the appellants.

P. H. Rourke, for the respondent.

424 **CORLISS, C. J.** The motion to dismiss this appeal must be granted. The case was originally tried in the county court of Ransom county. The plaintiff in the action having been defeated **425** in that court, he had before him, under the statute, either of two courses to pursue—he could appeal to the district court, or he could appeal to the supreme court: Rev. Codes, sec. 6591. But both of these remedies were not open to him. They are inconsistent. It is one of the very elements of the law that, when a suitor reaches the parting of the ways in the pursuit of inconsistent remedies, he must elect which road he will follow. The first step taken is an election, and the election, when made, is irrevocable: Elliott's Appellate Procedure, sec. 149; 2 Ency. of Pl. & Pr. 179, 180; 7 Ency. of Pl. & Pr. 364; Wilson v. Roberts, 38 Neb. 206; Harvey v. Fink, 111 Ind. 249; Indiana etc. Ins. Co. v. Routledge, 7 Ind. 25; Traders' Ins. Co. v. Carpenter, 85 Ind. 350, and cases cited. The plaintiff made his election to have his case reviewed by the district court by appealing to that court. After perfecting his appeal, he had it dismissed on his own motion. Whether he could thereafter have appealed again to the district court, if that dismissal had been without prejudice to his right to take a second appeal, it is unnecessary to de-

cide. When he made his election to appeal to the district court, he took all the risks incident to an appeal to a higher tribunal; and if, because he discovered through some mistake in practice he was not in a position to derive any benefit from the appeal, he voluntarily dismissed it, that can have no bearing on the question of election. After he had taken his appeal to the district court, he was in the same position that he would have occupied had there existed no statute whatever authorizing an appeal to the supreme court. When the former appeal in this case was dismissed on the ground stated in the opinion of the court (*Field v. Great Western etc. Co.*, 5 N. Dak. 400), we refrained from expressing any view on the question we have been considering in this opinion. That decision did not settle the question of election of remedies, for the reason that it was unnecessary at that time to pass on that point in order to decide the motion to dismiss then presented. We have assumed in this decision that the amount in controversy in the county court was at least two hundred and fifty dollars. If it was ⁴²⁶ less than that sum, no question of election would arise. No right of appeal to the supreme court exists where the amount in controversy is less than two hundred and fifty dollars: Rev. Codes, sec. 6591. Whether, therefore, the amount was two hundred and fifty dollars or less than that sum, it is clear that the motion to dismiss should be granted.

All concur.

ELECTION OF REMEDIES—WHEN IRREVOCABLE.—A man may not take two contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate choice of one, with knowledge, or means of knowledge of such facts as would authorize a resort to each, will preclude him from going back and electing again: Note to *Cox v. Harris*, 62 Am. St. Rep. 190. For a complete discussion of the subject, see monographic notes to *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 487-494, and *Thomas v. Joslin*, 1 Am. St. Rep. 626-629.

BRYNJOLFSON v. NORTHWESTERN ELEVATOR COMPANY.

[6 NORTH DAKOTA, 450.]

EVIDENCE OF SUBSCRIBING WITNESSES—WHEN INDISPENSABLE.—By the rule of the common law, if there are subscribing witnesses to an instrument, its execution must be proved by them, and cannot be proved by any other witnesses, unless the inability to produce them is shown. The application of this rule is especially called for if the instrument is one which the law requires to be attested by subscribing witnesses.

CHATTEL MORTGAGES—SUBSCRIBING WITNESSES.—Though a chattel mortgage is acknowledged as required by statute, its execution can be proved only by the testimony of the subscribing witnesses, unless an inability to procure their testimony is shown.

Ball, Watson & Maclay, for the appellant.

W. J. Kneeshaw and M. Brynjolfson, for the respondent.

⁴⁵¹ CORLISS, C. J. We are compelled to reverse the judgment in this case for error of the court in receiving in evidence an instrument purporting to be a chattel mortgage, without calling the subscribing witnesses thereto, or either of them, or in any manner accounting for the failure to produce them, or either of them, on the trial. They were not shown to be dead or out of the jurisdiction of the court, nor was an effort to secure their presence on the trial shown. At the time the instrument referred to was offered in evidence, there was nothing in the case to show that these witnesses were not within reach. They may have been in the courtroom during the trial, so far as this record throws any light ⁴⁵² on the subject. The action being instituted by a chattel mortgagee for the conversion of mortgaged property, it is manifest that due proof of the mortgage was indispensable, the answer having put in issue the allegation of the complaint relating to the execution of such mortgage. It is true that the plaintiff himself testified that he was present, and saw the alleged mortgagor sign the instrument. But the rule at common law was well settled that no amount of proof would establish the execution of an instrument to which there were subscribing witnesses, unless it was shown that they were dead, or were beyond the jurisdiction of the court, or their evidence could not, for some reason, be obtained. Their evidence was regarded as the best evidence; and therefore such evidence must, at common law, be produced, or the inability of the party to produce it be shown, before resort to other evidence would be permitted. While the reason for this rule has long since ceased to exist, the rule itself has been almost universally recognized, as being too firmly imbedded in the law of evidence to be wrenched therefrom by judicial decisions. Some of the courts which have most powerfully reasoned against its perpetuation as a rule of evidence have felt constrained to yield to its binding force in the absence of statutory change. If there is any case in which such rule should be applied, it is in a case involving the proof of an instrument required by law to be attested by subscribing witnesses. This is true with respect to a

chattel mortgage: Rev. Codes, sec. 4738. See, as sustaining the rule, the following authorities: 1 Greenleaf on Evidence, sec. 569; Fox v. Reil, 3 Johns. 477; Brigham v. Palmer, 3 Allen, 450; Barber v. Terrell, 54 Ga. 146; Warner v. Baltimore etc. R. R. Co., 31 Ohio St. 265; Rex v. Harringworth, 4 Maule & S. 353; Doe v. Durnford, 2 Maule & S. 62; Heckert v. Haine, 6 Binn. 16; Wishart v. Downey, 15 Serg. & R. 77; McMahan v. McGrady, 5 Serg. & R. 314; Whyman v. Garth, 8 Ex. 803; Fletcher v. Perry, 97 Ga. 368; McVicker v. Conkle, 96 Ga. 584; Lapowski v. Taylor, 16 Tex. Civ. App. 624; Barry v. Ryan, 4 Gray, 523; Glasgow v. Ridgeley, 11 Mo. 34; Hollenback v. Fleming, 6 Hill, 306; Abbott's Trial Evidence, 505.

⁴⁵³ The common-law rule appears to have embodied it in modified form in our statutes. Section 3579 of the Revised Codes provides that "proof of the execution of an instrument, when not acknowledged, may be made either: 1. By the party executing it, or either of them; or 2. By a subscribing witness; or 3. By other witnesses in cases mentioned in sections 3581 and 3582." Section 3581 of the Revised Codes declares that "the execution of an instrument may be established by proof of the handwriting of the party and of the subscribing witness, if there is one, in the following cases: 1. When the parties and all the subscribing witnesses are dead; or 2. When the parties and all the subscribing witnesses are nonresidents of the state; or 3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or 4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve a subpoena or an attachment; or 5. In case of the continued failure or refusal of the witness to testify for the space of one hour after his appearance." In the case at bar, none of the provisions of these statutes were complied with. The party alleged to have executed the chattel mortgage was not examined as a witness. The subscribing witnesses were not called. There was no proof that they were dead or resided beyond the limits of the state, or that the place of their residence was unknown to the plaintiff, and could not be ascertained by the exercise of due diligence, or that they concealed themselves, or could not be found by the exercise of due diligence in attempting to serve a subpoena or attachment upon them. Nor did it appear that they had refused to testify for the space of one hour after being called as witnesses. It is perhaps not entirely clear whether the sections cited relate to the proofs of instru-

ments upon the trial of cases, or whether their utmost scope is not to regulate the mode of proving instruments for the purpose of entitling such of them to record as require proof as a condition precedent to the recording thereof. We need not settle that point in this case, for the common-law ⁴⁵⁴ rule had not, when this case was tried, been abrogated in this state. With respect to future trials, this decision will not long be important, for the legislature has, at the suggestion of this court, entirely swept away the common-law rule, which for many years had been an anomaly in the law of evidence: Laws 1897, c. 79. It is immaterial that the chattel mortgage was acknowledged. This did not entitle it to be read in evidence without further proof. The statute permitting instruments which have been duly acknowledged to be received in evidence without additional proof relates to instruments affecting real property: Rev. Codes, sec. 5696.

All concur.

EVIDENCE—BEST AND SECONDARY—SUBSCRIBING WITNESSES.—The best evidence of which the nature of the case is capable must be given: *Jackson v. Cullum*, 2 Blackf. 228; 18 Am. Dec. 158. Where the subscribing witness to an instrument is not within the state, his evidence may be dispensed with: *Note to Valentine v. Piper*, 33 Am. Dec. 723. The loss of a paper or the death of a witness may, for the purpose of laying the foundation for secondary evidence, be proved by a witness interested in the cause, or even by one of the parties: *Jackson v. Davis*, 5 Cow. 123; 15 Am. Dec. 451; but it was a rule of the common law that no evidence of the execution of an instrument would be received until the subscribing witness was produced or his absence accounted for: *Note to Lynch v. Postelthwaite*, 12 Am. Dec. 504.

KOLKA v. JONES.

[6 NORTH DAKOTA, 461.]

FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION without probable cause, the plaintiff is answerable to the defendant, though the latter was not arrested nor his property rights interfered with in any manner. Statutes awarding costs to the successful litigant do not abridge his right to recover for such a malicious prosecution.

FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION the plaintiff is not liable if he had probable cause for believing his action could be brought.

PROBABLE CAUSE IS A QUESTION OF LAW, if the facts are not disputed; otherwise, it is a question of fact for the jury to determine.

MALICE MAY BE INFERRED from the prosecution of a civil action without probable cause.

MALICIOUS PROSECUTION.—THE MALICE NECESSARY to sustain an action for malicious prosecution need not be ill-will toward the defendant, but may be any unjustifiable motive.

MALICIOUS PROSECUTION.—IF A CIVIL ACTION IS BROUGHT by a person knowing the claim sued on has been satisfied, he cannot justify his conduct, and is answerable for malicious prosecution.

MALICIOUS PROSECUTION OF CIVIL ACTION—LEGAL MALICE IS MADE OUT by showing that an action was instituted from any improper or wrongful motive, and it is not necessary that actual malevolence or corrupt design be shown. What is done willfully and purposely, if it be at the same time known to the doer to be wrong and unlawful, is, in legal contemplation, malicious.

MALICIOUS PROSECUTION—EVIDENCE OF PROBABLE CAUSE.—The voluntary dismissal of a suit is prima facie evidence of want of probable cause for its institution.

MALICIOUS PROSECUTION OF CIVIL ACTION.—Attorneys' fees, to the extent that they are reasonable and necessary, may be recovered in an action for the malicious prosecution of a civil action.

PRACTICE—MOTION TO STRIKE OUT EVIDENCE.—The sufficiency of competent evidence to prove a fact cannot be challenged by motion to strike out evidence properly received. The remedy of the party, if such evidence is not legally sufficient to support a finding against him, is to ask the court to instruct the jury to disregard it.

EVIDENCE.—A GENERAL OBJECTION to evidence is not sufficient to raise any question which could have been obviated, had it been specifically pointed out.

John A. Sorley and George A. Bangs, for the appellant.

De Puy & De Puy, for the respondent.

404 **CORLISS, C. J.** The plaintiff has recovered judgment against the defendant in an action for malicious prosecution of a civil suit. At the threshold of the case we are met with the contention that for the malicious institution and prosecution of a civil action without probable cause there is no remedy, unless the person of the defendant in such action has been arrested or his property seized therein, or unless there exists special circumstances removing the case from the category to which belong ordinary civil actions. On this very interesting question we find the decisions in hopeless conflict. In this jurisdiction it is an open question, and we shall therefore settle it upon principle and in accordance with the weight of argument, without reference to the number of authorities which can be arrayed upon the opposite sides, respectively, of this controversy. It may not be amiss, however, to remark that in our opinion the scales in which are balanced the relative weight of authority on this point have turned and that now it is no longer true, as erstwhile it was, that

the adjudications preponderate in favor of the English rule, that in the absence of the arrest of the person or of the seizure of property, or of other special circumstances, the successful defendant has no remedy, despite the fact that his antagonist proceeded against him maliciously and without probable cause. Favoring the English doctrine, we find the following authorities: *Potts v. Imlay*, 4 N. J. L. 377 (330*), 7 Am. Dec. 603; *Mayer v. Walter*, 64 Pa. St. 289; *Eberly v. Rupp*, 90 Pa. St. 259; *McNamee v. Minke*, 49 Md. 122; *Wetmore v. Mellinger* (Iowa, Jan. 16, 1883), 18 N. W. Rep. 870; *Mitchell v. Southwestern R. R. Co.*, 75 Ga. 398; *Ely v. Davis*, 111 N. C. 24; *Terry v. Davis*, 114 N. C. 31; *Rice v. Day*, 34 Neb. 100; *Gorton v. Brown*, 27 Ill. 489; 81 Am. Dec. 245. Opposed to the English rule, we marshal decisions from the states of Connecticut, New York, Minnesota, Kansas, Kentucky, Missouri, Colorado, Ohio, Louisiana, Michigan, Tennessee, Indiana, Vermont, Massachusetts, and California: *Lipscomb v. Shofner*, 96 Tenn. 112; *McCardle v. McGinley*, 86 Ind. 538; 44 Am. Rep. 343; *Lockenow v. Sides*, 57 Ind. 360; 26 Am. Rep. 58; *McPherson v. Runyon*, 41 Minn. 524; 16 Am. St. Rep. 727; *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Whipple v. Fuller*, 11 Conn. 582; 29 Am. Dec. 330; *Marbourg v. Smith*, 11 Kan. 554; *Cox v. Taylor*, 10 B. Mon. 17; *Pangburn v. Bull*, 1 Wend. 345; *Eastin v. Bank of Stockton*, 66 Cal. 123; 56 Am. Rep. 77; *Wood v. Finnell*, 13 Bush, 629; *Allen v. Codman*, 139 Mass. 136; *Smith v. Burrus*, 106 Mo. 94; 27 Am. St. Rep. 329; *Johnson v. Meyer*, 36 La. Ann. 333; *Hoyt v. Macon*, 2 Colo. 113; *Brady v. Erwin*, 48 Mo. 533; *Antcliff v. June*, 81 Mich. 477; 21 Am. St. Rep. 533; *Pope v. Pollock*, 46 Ohio St. 367; 15 Am. St. Rep. 608; *Brand v. Hinchman*, 68 Mich. 590; 13 Am. St. Rep. 362; *O'Neil v. Johnson*, 53 Minn. 439; 39 Am. St. Rep. 615; *Dolan v. Thompson*, 129 Mass. 205; *Sartwell v. Parker*, 141 Mass. 405.

In the case at bar, it appears that the defendant in the civil actions alleged to have been prosecuted maliciously and without probable cause was not arrested, and that his property rights were not in any manner interfered with. The suits complained of consisted of three successive actions instituted in justice's court upon the same claim, each case being voluntarily dismissed by the defendant herein when the day for trial arrived. Without at this point adverting more particularly to the facts, we will dispose of the question whether the action will lie, assuming the suit to have been maliciously brought without probable cause. We wish to settle the law in this state, not upon the peculiar features of this case, but upon the broad basis that the malicious

prosecution of a civil action without probable cause is a legal wrong, for which the law will afford redress, without reference to any inquiry touching the seizure of property, the arrest of the person, or other special circumstances. Before the statute of Marlbridge (52 Henry III.) an action for the malicious prosecution without probable cause of a mere civil action would lie: *Closson v. Staples*, 42 Vt. 209-214; 1 Am. Rep. 316; *Lockenow v. Sides*, 57 Ind. 364; 26 Am. Rep. 58; *Lipscomb v. Shofner*, 96 Tenn. 112; *Pope v. Pollock*, 46 Ohio St. 367; 15 Am. St. Rep. 608; 14 Am. & Eng. Ency. of Law, 32. Why this rule should have been departed from after the act of 52 Henry III. had been passed, is apparent from the language of ⁴⁶⁰ that act. It gave to the defendant who had prevailed in the cause, not merely his costs, but also his damages, and, to make apparent the purpose of parliament to substitute this remedy for the action for malicious prosecution, these costs and damages were given only in actions which were malicious, and not in all actions generally: *Lehigh etc. R. R. Co. v. McFarland*, 44 N. J. L. 674-676. Subsequent legislation in England shows that the statute of Marlbridge was enacted, not as a general law regulating costs, but to afford a summary remedy to the successful defendant in place of the existing right of action to recover his damages on account of the malicious prosecution of a civil action against him. The statute of Gloucester (6 Edward I., c. 1) gave the defendant costs where he recovered damages, and finally, by the act of 23 Henry VIII, chapter 15, the defendant was given costs in all cases in which he was successful, whether he recovered damages or not, provided the case was one in which the plaintiff could have recovered costs had he been the prevailing party: *Lehigh etc. R. R. Co. v. McFarland*, 44 N. J. L. 674-676. The act of the British parliament which was held to take away the existing cause of action for damages for the malicious prosecution of a civil suit was an act which in terms was limited to cases of that kind; and when it is remembered that it gave the defendant, not merely his costs, but also his damages, it is obvious that the statute was framed to give the successful defendant his remedy in the very case in which he was maliciously prosecuted, instead of compelling him to seek redress in an independent action. Between such legislation and the statutory enactments of this country on the subject of costs there is the widest possible difference. The statute of Marlbridge was limited to civil actions maliciously prosecuted, and gave the defendant the damages he had suffered because of such perversion of the forms and remedies of the law,

whereas the statutes regulating costs on this side of the water are not restricted to actions in which the motive prompting the litigation was unjustifiable, but are intended to apply to all cases, to the end that some indemnity to the other suitor may be afforded ⁴⁰⁷ in every case, independently of the state of mind of the person bringing the suit, on the question whether he had reasonable ground for believing that the action could be maintained; leaving the remedy for a perversion of legal machinery to the common-law maxim that for every wrong the law will give legal redress. General statutes regulating costs make no discrimination between the honest suitor, who, having a valid claim, may yet fail, for some reason, to establish it in court, and the malignant persecutor and harasser of a citizen, who, by his abuse of legal forms, causes heavy damage to such citizen, in property, reputation, and business prospects, by the unfounded suit, which he who institutes it knows full well he cannot maintain. Each must pay the statutory costs, and the same rule measures the liability of each for such costs. That our meager bill of costs was intended to recompense the victim of the malicious prosecution of a civil suit is, to our minds, unthinkable. It is true that our statute gives the successful suitor a right to recover some trifling items of costs, and certain specified disbursements, as indemnity; but it is indemnity for the defense (in the case of a defendant) of an action, without reference to the question whether there has been a malicious perversion of legal remedies. If it was enacted to cover cases of an abuse of legal machinery, then it is evident that all remedy for such an abuse was intended to be withheld; for, in such a view of the statute, he who lawfully uses and he who maliciously perverts the right to sue would stand upon precisely the same footing with respect to the question of liability for their respective acts. Even when the plaintiff has acted in the utmost good faith the defendant will often suffer, on account of the suit, damages which taxable costs will not even approximately compensate. But it is the policy of the law not to throw around the right of the citizen to appeal to the courts for redress such risks that fear of the possible consequences will deter him from asserting a claim he honestly deems himself entitled to enforce. In ordinary cases, the injury a defendant suffers, beyond the slight indemnity which statutory costs afford him, is one of the ⁴⁰⁸ many inevitable burdens which men must sustain under civil government. He is forced to bear it for the public good. A wise policy requires that the honest claimant should not be frightened from invoking the aid of the law by the statutory

threat of a heavy bill of costs against him in case of defeat. But certainly no such policy demands that malice should, by the assurance of protection in advance, be encouraged to vex, damage, and even ruin a peaceful citizen by the illegal prosecution of an action upon an unfounded claim.

We will briefly notice the arguments adduced by courts in this country to support here the English rule. Ignoring the differences between the phrasology and manifest purpose of the statute regulating costs in this country, and the letter and obvious spirit of the statute of Marlbridge, the assertion is not infrequently made that costs afford full indemnity, though the suit be instituted without probable cause, and prosecuted in a spirit of malice. To our minds, this argument does not rise to the dignity of sophistry. The claim that the payment of statutory costs will in all cases, or even in any case, make amends for the damage inflicted by the malicious prosecution of a civil suit, is palpably false. To hold that, because the dishonest suitor has been required to give his successful antagonist some trifling measure of indemnity, therefore it follows that the purpose is disclosed to withhold a remedy for a grievous wrong, which on a fundamental maxim of British jurisprudence, should not be withheld, is, to our minds, a violent stretch of imagination. When the argument of expediency is advanced, it suffices to reply to it by pointing to those states in which it has long been the rule that an action will lie for the malicious prosecution of a civil action without probable cause. There we find no legislative change of this rule. Nor have the courts in those states made haste, because they have discovered its impolicy, to overrule a doctrine which, it has been predicted by other courts that have refused to adopt it, would clog and choke the channels of litigation with a multiplicity of suits springing up as each case was decided in favor of the ⁴⁰⁰ plaintiff or the defendant. These forebodings have not been realized. Nor, in our judgment, had they ever any foundation in reason or a knowledge of human nature. The suitor who has sustained the burden of one action will not assume the expense of a second suit unless he has a strong guaranty that he can convince a jury that the original action was instituted maliciously and without probable cause. In an experience of ten years as student and practicing lawyer in the state of New York, where the English doctrine is not followed, the writer of this opinion never during that time heard of an action in that state for the malicious prosecution of a civil suit. Doubtless such suits have been brought there, but they have been very infrequent. It is

safe to say that in that state not one civil suit in a thousand has been followed by an action for the malicious prosecution thereof.

Counsel for appellant, in his able and learned brief, argues that a defendant should not be accorded a remedy for the malicious prosecution of a civil action, for the reason that a plaintiff is given no remedy when he is delayed and harassed in his efforts to secure a judgment upon a valid claim by a fictitious defense maliciously interposed. Should we concede that there was no liability on the part of the defendant in the case supposed, it would by no means follow that this defect in the law should be allowed to destroy a right of action which from time immemorial has existed, save when it has been taken away by express statute, as in the case of the statute of 52 Henry III. But we do not concede the postulate of counsel for appellant. Legal science has not yet attained its full development. It is constantly undergoing changes. New doctrines are being established. Old rules are receiving modifications. Under altered social or economical conditions, it will often appear that the continued denial of a remedy for what was once not a serious, but which has finally become a grievous wrong, can no longer be maintained. Moreover, a right may have lain dormant because never asserted. This affords no argument against the enforcement of such right for the first time. It is not safe to infer that because no one has⁴⁷⁰ thought of seeking indemnity for the injury he has sustained by reason of the interposition, by the defendant from unjustifiable motives, of a false defense or a spurious counterclaim, therefore no remedy will in such a case be allowed by the law. On the contrary, we are strongly of the opinion that, if a defendant should force upon the plaintiff the litigation of an alleged counterclaim known by defendant to be without foundation, he would be liable for the damages caused thereby—the liability to be enforced in a suit in the nature of an action for malicious prosecution.

Passing now from the main question of liability, it becomes necessary to refer with greater particularity to the facts. The plaintiff in this case, Kolka, employed his nephew, named Gresczykowski, to work for him upon his farm. After having labored there upward of two years, Gresczykowski appeared at the office of the defendant, Jones, who was a collector, and placed with him for collection a claim against Kolka for his services as a farmhand. In our discussion of the facts, we shall state those which uphold the plaintiff's case; for, the jury having

rendered a verdict sustaining his claim for damages, we must assume that every controverted issue was determined in his favor, so far as it is necessary to so assume in support of such verdict. This claim of Gresczykowski against Kolka appears from the testimony of Gresczykowski to have been twelve dollars and no more. The jury were warranted in finding that Jones knew that the claim did not exceed twelve dollars, but, on the other hand, that Jones was justified in believing that Gresczykowski had some claim against Kolka; and that he did so believe, does not, in view of the evidence in the case, admit of doubt. Gresczykowski left this claim with Jones for collection. Subsequently Jones sued Kolka upon it, in the name of Gresczykowski as plaintiff; the suit being brought before a justice of the peace at Minto, Walsh county, in this state, whose name was McQuatt. On the return day of the summons, the case was dismissed at the request of Jones, and at the same time he procured a new summons to be issued by the ⁴⁷¹ same justice on the same claim, the second suit being likewise brought in the name of Gresczykowski. On the return day of this summons the second action was also dismissed by Jones, and subsequently a third action was brought against Kolka before a justice named Nichols, at Conway, about twenty miles further away. This third action was, like the other two, voluntarily discontinued by Jones. Without at this conjuncture adverting further to the facts, we may pause and inquire whether the first two actions were instituted by Jones in the name of Gresczykowski without probable cause. However maliciously they may have been carried on is immaterial, unless Jones was in law without probable cause for believing that they could be maintained: Jaggard on Torts, 625; Cooley on Torts, 208; Crescent City Live-Stock Co. v. Butcher's Union Slaughterhouse Co., 120 U. S. 141; Lacey v. Porter, 103 Cal. 597. Probable cause is, on undisputed facts, a question of law. Of course, it is necessary, not only that there should be ground for believing that there was a cause of action, but also that the person bringing the action should have so believed in good faith: Ball v. Rawles, 93 Cal. 222; 27 Am. St. Rep. 174. But whether, on conceded or established facts, the party had reasonable ground for assuming that an action would lie, is, as a general rule, a question of law: Cooley on Torts, 209, and cases cited; Sartwell v. Parker, 141 Mass. 405; 1 Jaggard on Torts, 626; Stone v. Crocker, 24 Pick. 84; Lancaster v. Langston (Ky., June 12, 1896), 36 S. W. Rep. 521; Smith v. Munch; 65 Minn. 256; Bell v. Atlantic Ry. Co., 58 N. J. L. 227. In this case, we have

no doubt that Jones was, as a matter of law, justified in believing that Gresczykowski had a valid claim against Kolka. Gresczykowski so informed him, and there was nothing about the circumstances to excite his suspicions to the contrary. Indeed, we are strongly of the opinion that Gresczykowski did have a good cause of action against Kolka. Kolka, in his testimony, says: "I owed him [Gresczykowski] nothing outside of the twelve dollars." (This is the amount that Gresczykowski claimed to Jones was owing to him.) And it appears that Kolka, subsequently ⁴⁷² to the commencement of the first action against him, settled with Gresczykowski, paying him this very sum of twelve dollars. We consider, too, that while the question whether a person actually believes that there is probable cause for commencing a suit is a question of fact, yet that, under the evidence in this case, the jury were not warranted in finding that Jones did not believe that Gresczykowski had a good claim against Kolka. The evidence satisfies us that Jones did honestly think that Kolka owed Gresczykowski something. It is apparent, therefore, that, when Jones brought the first two suits in the name of Gresczykowski, he had probable cause for so doing, and that, therefore, no action for malicious prosecution can be predicated upon the commencement and dismissal of those two actions: *Wills v. Noyes*, 12 Pick. 324-327. But there is ample evidence in the case to show that, before the third action was brought, Jones knew that Kolka had settled in full with Gresczykowski; and there is also sufficient evidence to prove that Jones knew that he had no title to the claim held by Gresczykowski against Kolka, but that despite this fact he caused the third action to be brought in his own name. Unlike the first two actions, the third one was commenced in the name of Jones himself, his object in so doing being very apparent. When he was informed that Kolka and Gresczykowski had settled their differences, he replied that they could not settle, because he (Jones) had an assignment of the claim. The evidence fully warranted the jury in finding that Jones, knowing that he had no right to the claim (his own testimony shows this clearly), brought the third suit in his own name for the purpose of taking the position that he owned the claim, and that, therefore, the settlement referred to was no defense. Whether the jury found, as they were warranted in doing, that Jones sued in his own name, knowing that he had no title to the claim, or found, as they might well have found under the evidence, that Jones brought suit after he had heard

that the owner of the demand had settled with the debtor, Kolka, a conclusive case of want of probable cause was made out. The attack on the verdict on the ground of ⁴⁷³ the insufficiency of the evidence to show want of probable cause is therefore unwarranted, and must be overruled. On the question of malice, the evidence is full and satisfactory. Indeed, malice may be inferred by a jury from want of probable cause: Cooley on Torts, 214; cases in note to *Ross v. Hixon*, 46 Kan. 550; 26 Am. St. Rep. 151, 152; 1 Jaggard on Torts, 624; *Louisville etc. R. R. Co. v. Henricks*, 13 Ind. App. 10. The malice necessary to sustain the action for malicious prosecution need not be ill-will toward the plaintiff. Legal malice will support the action, and any unjustifiable motive constitutes legal malice. If a person, knowing that a claim has been satisfied, and knowing that he never had any title thereto, brings a suit thereon in his own name, it is impossible for him to justify his conduct in law. In such a case—and the jury found that that is this case—the defendant is deemed to have been actuated by legal malice. Certainly there is ample proof of malice in this case to warrant the verdict that the prosecution was malicious. Judge Cooley says: "Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown": Cooley on Torts, side p. 185. Chief Justice Shaw, in *Wills v. Noyes*, 12 Pick 328, speaking of the malice necessary to be established in the action for malicious prosecution, says: "The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious. That which is done contrary to one's own conviction of duty, or with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or, in the language of the charge, to do a wrong and unlawful act, knowing it to be such, constitutes legal malice: See, also, *Newell on Malicious Prosecution*, secs. 13, 14; p. 247; 1 Jaggard on Torts, 614, 615; *Pace v. Aubrey*, 43 La. Ann. 1052; *Bartlett v. Hawley*, 38 Minn. 308; ⁴⁷⁴ *Grinnell v. Stewart*, 32 Barb. 550." If no presumption of malice could be deduced from the want of probable cause, yet the commencement by Jones of an action in his own name, on a claim to which he knew he had no title, after he knew that the claim

had been in law extinguished by settlement between the parties, must be deemed to have had for its object no other purpose than to so harass Kolka as to force him to pay Jones an additional sum not owing by him to Gresczykowski. This theory is much confirmed by the fact that the third suit was brought before another justice, about twenty miles away.

The following portion of the charge was excepted to: "The court instructs the jury that the bringing and dismissal of the suits in the manner which they were brought and dismissed is *prima facie* evidence of the want of probable cause, but is not conclusive evidence of the want of probable cause; and if the jury believe from all the evidence and circumstances as they exist, and, as shown by the evidence, excuse the bringing and dismissal of the case, and there was in the defendant's mind a well-grounded belief, and that he had probable cause to believe the facts as testified to by him, then the plaintiff is not entitled to recover." We find no error in this. It is well settled that the voluntary dismissal of a suit is *prima facie* evidence of want of probable cause: *Wetmore v. Mellinger* (Iowa, Jan. 16, 1883), 14 N. W. Rep. 722; *Burhans v. Sanford*, 19 Wend. 417; *Nicholson v. Coghill*, 4 Barn. & C. 21; *Green v. Cochran*, 43 Iowa, 544; *Cooley on Torts*, side p. 185. Such dismissal, unexplained, is as cogent evidence of want of probable cause as the failure of the prosecutor in a criminal action to make out a sufficient case to satisfy a committing magistrate. And yet it has been repeatedly held that the discharge of the plaintiff in the malicious prosecution action by a committing magistrate is *prima facie* evidence of want of probable cause: *Cooley on Torts*, side p. 184; *Bigelow v. Sickles*, 80 Wis. 98; 27 Am. St. Rep. 25; *Barhight v. Tammany*, 158 Pa. St. 545; 38 Am. St. Rep. 853; *Brown v. Vittur*, 47 La. Ann. 607; *Smith v. Eastern etc. Assn.*, 116 N. C. 73; *Newell on Malicious Prosecution*, 283. But it is ⁴⁷⁵ urged that the statute law in this case gives the plaintiff in an action an absolute right to dismiss it at any time before it is finally disposed of, and that, therefore, such a dismissal cannot be held to constitute even *prima facie* evidence of want of probable cause. Counsel for appellant asserts that such a rule of evidence would take away the plaintiff's absolute right to dismiss his action. But the most superficial consideration of the matter will suffice to show the unsoundness of this reasoning. The rule of evidence which we uphold and apply in this case is one which creates a mere presumption. It does not purport to render illegal that which,

both under the statute and at common law, is strictly lawful. If the plaintiff has probable cause for commencing his suit, the dismissal thereof will not render actionable the institution of such suit. It will merely call upon him to show that there was in fact probable cause for bringing the action. And it is entirely reasonable that the voluntary discontinuance by a party of an action which he absolutely controls should, in an action of this character, shift the burden of proof. To establish want of probable cause is to prove a negative, and it is elementary that to prove a negative requires only slight evidence. See Newell on Malicious Prosecutions, sec. 17, p. 282. This principle must be kept in mind in testing the correctness of the rule we enunciate. It does not admit of doubt that evidence that one who controls an action has of his own free will discontinued it has a tendency to show that he never had faith in his action, from its inception. True it is that actions honestly commenced are often dismissed for various reasons, but it does not necessarily follow that such is the case in every instance. It is quite possible that the plaintiff abandoned his suit because he knew from the beginning that he had no case. If this is not so in a particular instance, it is peculiarly within the plaintiff's power to show the contrary. That is a fact exclusively within his own knowledge, and one which it is easy for him to prove. The other party is powerless to establish the plaintiff's motive for dismissing the case, unless he incurs all the hazard of calling the plaintiff himself as a witness in the action. In *Nicholson* ⁴⁷⁶ v. *Coghill*, 4 Barn. & C. 21, Judge Holroyd says: "In order to support actions of this nature, two ingredients are necessary—malice, and the want of probable cause; and evidence must be given on the part of the plaintiff from which they may be inferred. Here I think that there was some evidence to be left to the jury, and that, in the absence of any answer to it, they were justified in finding for the plaintiff. The ground of the discontinuance was peculiarly within the knowledge of the plaintiff in the former action, and he might have proved it. In actions for a malicious prosecution it has been held that evidence of the bill having been thrown out by a grand jury is sufficient to warrant an inference of the absence of probable cause. So in this case I think that malice and the absence of probable cause may be inferred from the discontinuance; that being the act of the present defendant, and not having been explained by him." In view of the fact that in actions for malicious prosecution only slight evidence is required

to make out a *prima facie* case as to want of probable cause, and of the further fact that the voluntary discontinuance of the case has some tendency to show that the plaintiff never had any faith in his action, we deem it a just and reasonable rule that proof of such voluntary discontinuance, unexplained, is sufficient to carry the case to the jury, when the ease with which the plaintiff can explain his conduct is considered in connection with the difficulty the defendant will encounter when he tries to show that the plaintiff's motive in dismissing the case was his conviction from the beginning that the action would not lie. Most of the decisions cited by counsel for the appellant on this branch of the case are not in point. In *Asevado v. Orr*, 100 Cal. 293, the court decided that the voluntary dismissal of an action by the plaintiff is not an admission of want of probable cause. No one ever supposed it was. By discontinuing his suit the plaintiff therein does not forever concede that he had no probable cause for commencing it. But this is entirely different from the question whether it is a reasonable rule to so shift the burden of the proof, as to require the party who alone has knowledge ⁴⁷⁷ of the facts to explain his conduct, in view of the fact that such conduct does have some tendency to prove that he did not originally believe he could succeed in the case. The only adjudication we can find which is opposed to our ruling is *Smith v. Burrus*, 106 Mo. 94; 27 Am. St. Rep. 329. All that the court in the case at bar, in substance, said was, that the voluntary dismissal of the case raised the presumption of want of probable cause. It distinctly stated in the same connection that the jury might nevertheless find that the defendant did in fact have probable cause for bringing the actions. It is true that the language of the court in charging that a *prima facie* case had been made out by the fact of dismissal is not altogether free from criticism. But the criticism arises from the fact that the district judge qualified the rule, and seemed to consider that other conditions must combine with the mere fact of voluntary dismissal to warrant the inference of want of probable cause. In this the court erred. But the error was not prejudicial to the defendant. If the voluntary dismissals of the cases raised the presumption of want of probable cause, it certainly was not to defendant's prejudice that the court told the jury that, in the absence of explanation by the plaintiff in the former suit, this inference arose in the case at bar, not, however, from the mere fact of voluntary dismissals alone, but from that fact when coupled with other circumstances.

During the progress of the trial the plaintiff testified that, in the defense of the actions instituted against him by Jones, he had paid thirty-five dollars for attorneys' fees. This evidence was objected to on the ground that it was incompetent, irrelevant, and immaterial. The evidence having been received over objection, the defendant, after both parties had rested, moved to strike it out on the grounds that it was not proper evidence, and was incompetent, irrelevant, and immaterial. This motion was denied. It is now urged that the evidence should not have been received, for the reason that it was not shown that the fees paid by plaintiff to his attorneys were reasonable for the services rendered. It is apparent that no such point was intended to be raised by the ⁴⁷⁸ objection made by counsel for defendant, or by his motion to strike out the evidence. These successive attacks upon this evidence were leveled against the right of plaintiff to prove as a portion of his damages payments made by him for attorneys' services in defense of the actions referred to. That such expenditures, to the extent that they are reasonable and necessary, may be recovered in an action for malicious prosecution, is well settled: *Mitchell v. Davies*, 51 Minn. 168; *Marshall v. Betner*, 17 Ala. 832; *Ziegler v. Powell*, 54 Ind. 173; *Gregory v. Chambers*, 78 Mo. 294; *Krug v. Ward*, 77 Ill. 603; *Walker v. Pittman*, 108 Ind. 341; *Landa v. Obert*, 45 Tex. 539. It is true that in the case at bar the plaintiff did not go far enough to entitle him to recover the sums paid by him for attorneys' fees. There is no evidence that the charges of his attorneys were reasonable: *Mitchell v. Davies*, 51 Minn. 168. But in proving this element of damages the plaintiff was compelled to proceed in the usual way, by establishing one fact at a time. It was entirely competent for him to prove the fact that he had paid thirty-five dollars for attorneys' fees; but, to make this thirty-five dollars an element in the damages which he could recover, it was necessary for him to go further, and establish the additional fact that the services of his attorneys were reasonably worth that sum. This he could not do by his own evidence, he not being qualified to testify on that subject. All he could swear to was the bare fact of payment, and his testimony in this regard was both competent and within the issues. While it is true that the plaintiff failed to supplement this evidence with the necessary proof of the reasonableness of the charges of the attorneys for the services rendered, yet this oversight on his part did not destroy either the competency or relevancy of the evidence already re-

ceived. It is not a case in which there has been incompetent evidence received touching an item of damages. It is merely a case of insufficient evidence. The remedy of the suitor, under such circumstances, is to move the court, to direct the jury to disregard the matter not proven. This is precisely the course pursued by the defendant's counsel ⁴⁷⁹ in the case of *Mitchell v. Davies*, 51 Minn. 168, cited and relied on by defendant's counsel in this case. The sufficiency of competent evidence to prove a fact cannot be challenged by a motion to strike out the evidence properly received. Neither by objecting to the admission of such evidence, nor by moving to expunge it from the record in the case, can the point be raised that it should have been supplemented by additional proof: 1 Thompson on Trials, sec. 717. "But, where the judge admits evidence which is in the character of a link in a chain of facts necessary to make out the case of the proponent, the mere fact that the other links are not supplied will not support an exception to its admission, since, if it were otherwise, it would result in the principle that evidence is erroneously admitted because ultimately insufficient." In any case, if evidence is properly received, the party against whom it is offered has no absolute right to have it stricken out. His proper remedy is to request the court to instruct the jury to disregard it: 1 Thompson on Trials, sec. 716; *Gawtry v. Doane*, 51 N. Y. 84-90. This is true even when it appears from subsequent proof that the evidence is competent. Much more should this be the rule in cases where the subsequent developments on the trial do not establish the incompetency, but only the insufficiency, of the evidence properly received. In such a case, it was competent when offered, and is still competent so far as it goes, and an attack upon it as incompetent is misconceived. It is to the interests of the party complaining that this practice should be adopted. After he had been successful in his motion that evidence be stricken out, he has no guaranty that the jury will understand that they are not to consider it in deciding the case. To secure all the protection possible under the circumstances, he is interested in having the jury told in express terms that they must not take such evidence into account in making up their verdict. Had the trial court specifically charged the jury that they might allow the item of thirty-five dollars paid as attorney's fees, and had the defendant preserved an exception to such portion of the charge, ⁴⁸⁰ he would be in a position to insist on the point he makes. Failing to raise the point that the evidence was insufficient to warrant the jury in considering the item of thirty-five

dollars in fixing the plaintiff's damages, either by request to take that item from the jury, or by exception to the portion of the charge submitting it (there being no portion of the charge which relates to such item enucleated from other items of actual damage for the defendant to except to), and no point having been made on the motion for a new trial that the evidence was insufficient to justify the verdict as to this item of damages (even assuming that it appears that the jury have allowed such item), it follows that no question relating to the attorney's fees is before us for consideration. We have had occasion before to consider the importance of the rule of practice that a mere general objection is not sufficient to raise any question which could have been obviated had it been specifically pointed out, but no case has hitherto arisen in this state calling for its enforcement. We shall in all cases strictly enforce this highly just rule. A suitor should be fairly appraised by the language of the objection or the motion, as the case may be, just what point is made against his evidence, or what defect in proof is claimed by his antagonist, to the end that he may then and there, if possible, save himself from the consequences of error: *Springer Lithographing Co. v. Falk*, 8 C. C. A. 224; 59 Fed. Rep. 707; *Bright v. Ecker*, 9 S. Dak. 449; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *Hawver v. Bell*, 141 N. Y. 140; *Ladd v. Sears*, 9 Or. 244; *Reab v. McAllister*, 8 Wend. 109; *Hooper v. Railway Co.*, 37 Minn. 52; *Taylor v. Wendling*, 66 Iowa, 562; *Iowa Homestead Co. v. Duncombe*, 51 Iowa, 525; *Krolik v. Graham*, 64 Mich. 226; *Warren v. Warren*, 93 Va. 73; *Hutchison Mfg. Co. v. Pinch*, 107 Mich. 12; *Ives v. Leonard*, 50 Mich. 296; *Perkins v. Buaas* (Tex. Civ. App., Oct. 9, 1895), 32 S. W. Rep. 240; *Ayrault v. Pacific Bank*, 47 N. Y. 576; 7 Am. Rep. 489; *Camden v. Doremus*, 3 How. 530; *Stevens v. Hope*, 52 Mich. 65; *Wheaton v. Beecher*, 49 Mich. 348; ⁴⁸¹ *Daly v. Byrne*, 77 N. Y. 182; *Rodgers v. Wells*, 44 Mich. 411; *Lungerhausen v. Crittenden*, 103 Mich. 173; *Caledonia etc. Min. Co. v. Noonan*, 3 Dak. 189. See, also, *First Nat. Bank v. Laughlin*, 4 N. Dak. 391-402. Had the defendant, even in his motion to strike out the evidence, or in his objection thereto, stated the ground relied on, we have no doubt but that plaintiff would have offered some evidence to show that the sum paid was reasonable, or just what portion thereof was a reasonable charge under the circumstances. We have examined the other parts of the charge to which an exception was taken, but are unable to find that there was any error therein. It is possible that in arriving at their verdict in this case the jury have allowed damages for the first two actions

which we hold were lawfully commenced. But nowhere in the case does it appear that defendant sought on the trial to discriminate between his liability for the first two actions and his liability for the third. His attitude was that, if liable at all, he was liable for all. The only way in which it was possible for him to present the question he now seeks to have reviewed was by exception to the charge of the court, or by request that the court instruct the jury that there was no liability for the prosecution of the first two actions. Nothing of this kind was done by him. Had the court in express terms charged the jury that the plaintiff could recover damages for the first two actions as well as for the third, and had defendant failed to except to this charge, he could not now for the first time have raised the point. It is in practically this position that the defendant finds himself by reason of his failure to request an instruction and to except to the charge of the court on this point. We have less regret that the defendant is not in position to urge that the jury have considered the first two suits in fixing the amount of damages, in view of the comparatively small verdict which the jury rendered in this case. The malicious prostitution of legal remedies to subserve unworthy personal ends is not only an injury to the victim of the particular persecution, but also to ⁴⁸² society at large, if it is suffered to go unwhipped of justice. If the law will not punish such conduct, public confidence in the merits of our system of jurisprudence must inevitably be shaken, and the courts themselves will seem to have forsaken their high function as protectors and vindicators of invaded rights, and to have become, instead, the accomplices of evil men.

The judgment of the district court is affirmed.

All concur.

MALICIOUS PROSECUTION — ESSENTIALS. — Three things must be shown to maintain an action for malicious prosecution; the want of probable cause, the existence of malice, and the ending of the prosecution when the action was commenced: *Note to Satilla Mfg. Co. v. Cason*, 58 Am. St. Rep. 290. Probable cause depends upon the reasonable and honest belief of the party prosecuting. What facts and circumstances amount to probable cause is a question of law, and whether they exist in a particular case is a question of fact: *Burk v. Howley*, 179 Pa. St. 539; 57 Am. St. Rep. 607, and note. Malice may be inferred from the absence of probable cause: *Lunsford v. Dietrich*, 93 Ala. 565; 30 Am. St. Rep. 79, and note. See *Smith v. Burrus*, 106 Mo. 94; 27 Am. St. Rep. 329, and note: See monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 127-164; extended notes to *Williams v. Hunter*, 14 Am. Dec. 599-603, and *McCardle v. McGinley*, 44 Am. Rep. 346-348.

MALICIOUS PROSECUTION—RECOVERY OF ATTORNEY'S FEES.—Expenses incurred in defending himself against the prose-

cution which he claims to have been malicious may be recovered by the plaintiff, including a reasonable fee for his counsel in such criminal prosecution, whether it has been actually paid or not: See monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 163.

TRIAL.—OBJECTIONS TO EVIDENCE are not available, unless the grounds of objection are specified: *Gunter v. State*, 111 Ala. 23; 56 Am. St. Rep. 17, and note. Where testimony is competent for any purpose it will not be excluded on a general objection: *Mississippi Mills Co. v. Smith*, 69 Miss. 299; 30 Am. St. Rep. 546.

WELTER v. JACOBSON.

[7 NORTH DAKOTA, 82.]

REPLEVIN AGAINST SHERIFF—WHEN NOT MAINTAINABLE.—If a sheriff is already in possession of property taken by him in proceedings in an action of replevin, a second replevin suit cannot be maintained against him for the same property by a stranger to the first action.

SHERIFFS—REPLEVIN—LIABILITY TO THIRD PERSON IN TROVER.—If a sheriff, after taking property under a writ of replevin, is served with notice of a claim of ownership of the property by a third person, he renders himself liable in trover to such third person if he delivers the property to the plaintiff in replevin and such claim of ownership is proved. It is the privilege of the sheriff in such case to demand indemnity of the plaintiff in replevin, and if the latter refuses, or fails within a reasonable time to indemnify him, he may surrender the property to the defendant from whom he took it, and thus exonerate himself from all liability.

SHERIFFS—REPLEVIN—WHEN PROTECTED BY WRIT. A sheriff can justify his seizure under a writ of replevin only as to such property described therein as he takes from the possession of the defendant in the action, and, if he takes it from another who has the control over it, he becomes a trespasser and liable in trover, if it is in fact the property of such third person. But replevin cannot be maintained against the sheriff, in such case, unless he fails, within a reasonable time, to deliver the property to the party from whom it was taken.

REPLEVIN AGAINST SHERIFF.—CONTEMPT.—Property in the hands of an officer in a replevin suit is in the custody of the law and an attempt to wrest such possession from the officer by means of another action of replevin is a contempt of court.

REPLEVIN AGAINST SHERIFF—WHEN MAINTAINABLE.—Replevin may be maintained against a sheriff after it has become his duty to deliver the property taken by him under a writ of replevin to one of the parties in that suit, and he fails after a reasonable time to make such delivery.

J. H. Fraine and J. H. Bosard, for the appellant.

Spencer & Sinkler, for the respondent.

33 CORLISS, C. J. The plaintiff is pursuing a wrong remedy to vindicate her rights. She is seeking in an action of replevin to recover the possession of certain wheat seized by the defend-

ant, as the sheriff of Walsh county, in this state, under a requisition ³⁴ in claim and delivery proceedings instituted in another action of replevin by other parties against the husband of the plaintiff. The property was, when the second replevin suit was commenced, in custody of law, the sheriff not having at that time delivered the property to either of the parties to the first replevin action, and therefore it was not then subject to seizure in the new replevin action. Whatever differences of opinion have arisen touching the question whether, after delivery to one of the parties to the case, the property is still in custody of law, there is unanimity on this point. The sheriff is charged under the law with the duty of ultimately delivering the property to one of the parties to the litigation, to be held by him *pendente lite*. The court, through its executive officer, lays its hands upon the property until the question of the right to the custody of the res while the controversy over it remains unsettled, is determined. To assert the right of a stranger to the action to wrest the property from the sheriff's control is to proclaim the impotence of the court to protect its own jurisdiction and its own officers when obeying its commands. The property is seized to be held by the court until one party or the other shall have established his legal right to the possession thereof *pendente lite*; and the law commands the executive officer of the court to keep it until this question is settled, to the end that, when it is settled, the sheriff may deliver it to the party who is entitled thereto until final judgment. But how can the sheriff perform this duty, if it may be taken from him by the plaintiff in an other replevin action? If the defendant does not except to the sureties, or if they justify despite his challenge of their sufficiency, and if he does not rebound, the sheriff must deliver the property to the plaintiff. If, on the other hand, the plaintiff's sureties do not justify, or if the defendant does rebound, the sheriff must deliver the property to him, the defendant. In any event, one of the parties is, after a brief period during which the sheriff must hold the property, entitled to the possession thereof *pendente lite*. Will the law suffer the executive officer of a court to be embarrassed in the discharge of ³⁵ his duty by allowing the property to be taken from him in a second replevin suit, thus rendering the prompt performance of that duty impossible and the performance of it at all out of the question unless he rebounds, thereby being put to trouble and subjected to the hazard of loss in a matter in which he has no interest, but in which he stands indifferent between all the parties—those who are parties to the original replevin action

and the claimant as well? On principle, there can be only one answer to this inquiry. The property is in the custody of the law, and cannot, in judicial proceedings, be seized by anyone, not even the owner thereof, when such owner is a stranger to the suit. Considerations of justice from the standpoint of the sheriff reinforce the argument based on principle, and the authorities present an unbroken front on this point. They hold without exception that, in the absence of statutory change, the rule is, that while the officer has the custody of the property, replevin will not lie: *Sanborn v. Leavitt*, 43 N. H. 473; *Powell v. Bradley*, 9 Gill & J. 220, 274; *Hagan v. Deuell*, 24 Ark. 216; 88 Am. Dec. 769; *Weiner v. Van Rensselaer*, 43 N. J. L. 547; *White v. Dolliver*, 113 Mass. 400, 407; 18 Am. Rep. 502. To same effect are *Watkins v. Page*, 2 Wis. 98; *Weinberg v. Conover*, 4 Wis. 803; *Griffith v. Smith*, 22 Wis. 646; 99 Am. Dec. 90; *Tremaine v. Mortimer*, 25 Jones & S. 340; 7 N. Y. Supp. 681; *First Nat. Bank v. Dunn*, 97 N. Y. 149; 49 Am. Rep. 517. The cases of *Gross v. Bogard*, 18 Kan. 288, *Reiley v. Haynes*, 36 Kan. 259, 5 Am. St. Rep. 737, and *Davis v. Gambert*, 57 Iowa, 239, rest upon statutory provisions construed by the courts in those cases as authorizing a second replevin suit by a stranger to the first replevin action while the property was still in the custody of the sheriff. In *Gross v. Bogard*, 18 Kan. 288, the court expressly recognized the common-law rule which we apply in this case. "The question must be settled by a reference to our statutes, for it will not be doubted that, at common law, property in the hands of an officer under a writ of replevin was in custodia legis, and could not be taken from him by means of another writ." Some of the decisions prohibit the seizure of the property on execution or in a second replevin ³⁰ action even after it has been delivered to one of the parties to the first action of replevin, or has been left by the officer in the custody of a third person under a forthcoming bond: *First Nat. Bank v. Dunn*, 97 N. Y. 149; 49 Am. Rep. 517; *Goodheart v. Bowen*, 2 Ill. App. 578; *Pipher v. Fordyce*, 88 Ind. 436; *Bates Co. Nat. Bank v. Owen*, 79 Mo. 429; *Rhines v. Phelps*, 3 Gilm. 455; *Selleck v. Phelps*, 11 Wis. 380; *Hagan v. Lucas*, 10 Pet. 400; *Acker v. White*, 25 Wend. 614. On the other hand, many adjudications treat the property as subject to seizure under execution or in replevin the moment it is delivered into the hands of the plaintiff or the defendant in the original replevin action, and we believe that they state the true doctrine: *Kelleher v. Clark*, 135 Mass. 45; *White v. Dolliver*, 113 Mass. 400; 18 Am. Rep. 502; *Ilsey v. Stubbs*, 5 Mass. 280; *Coen v. Watkins*, 1 Mo.

App. 555; Hagan v. Denell, 24 Ark. 216; 88 Am. Dec. 769; Bell v. Bartlett, 7 N. H. 178-190; Sanborn v. Leavitt, 43 N. H. 473; Larson v. Nichols, 62 Minn. 256. We need not in this case settle this very interesting and somewhat important question. It is not here involved. An examination of the very decisions which hold that the grasp of the law upon the res is released by the delivery thereof to one of the parties to the litigation discloses the fact that they all recognize the doctrine that replevin will not lie against the sheriff.

The question has thus far been discussed on the theory that no change in the common-law rule has been effected in this state by legislation, and it now becomes necessary to ascertain whether any provision of the code has modified this doctrine of the common law. Section 5341 of the Revised Codes, provides: "If the property taken is claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent shall indemnify the sheriff against such claim by an undertaking, executed by two sureties, accompanied by their affidavits that ³⁷ they are each worth double the value of the property as specified in the affidavit of the plaintiff, exclusive of property exempt from execution, and freeholders or householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and, notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity." What was the purpose in view in enacting this statute? What liability, if any, does it impose upon the sheriff from which, independently of this section, he would be exempt? These questions it is not difficult to answer. Without such a law on the statute book, the sheriff would be absolutely protected by his writ—the requisition. Neither replevin nor trover would lie against him. Under such a condition of the law, the court would not stop to inquire whether the suitor was essaying to disturb the officer in his possession of the property, but would refuse to subject him to any liability whatsoever for obeying the positive mandate of a court, and following strictly the requirements of the law. Unlike an execution, a requisition in claim and delivery proceedings points out the specific property to be seized by the officer, and peremptorily directs him to take and hold

it thereunder. Having obeyed the court whose executive officer he is, by taking from the possession of the defendant in the requisition (for if he take it from another, a different question is presented) the very property described in the requisition, no tribunal will, without a statute, hold him responsible to a third person for this act. On this point the authorities are agreed: *Bullis v. Montgomery*, 50 N. Y. 352; *Foster v. Pettibone*, 20 Barb. 350; *Otis v. Williams*, 70 N.Y. 208; *Boyden v. Frank*, 20 Ill. App. 169; *Murfree on Official Bonds*, sec. 104c; *Shipman v. Clark*, 4 Denio, 446; 47 Am. Dec. 264; *Willard v. Kimball*, 10 Allen, 211; 87 Am. Dec. 632.

But it is obvious that section 5341 of the Revised Codes has wrought some change in the law touching the sheriff's liability on seizure of property under requisition in replevin actions, even when the property is taken from the possession of the defendant in such ^{ss} action. It was seen that, in case the defendant in such replevin action should not rebound, the property would, by the claim and delivery proceedings therein instituted, be transferred from the possession of the defendant to that of the plaintiff, thus substituting, perhaps, an irresponsible for a responsible party, who could be sued by a third person who might be the real owner of the property. To render the sheriff liable for the act of taking it from the defendant and delivering it to the plaintiff (the very act which the law requires him to perform), without giving him notice of the owner's claim, would be great injustice. And, even after he had received notice thereof, it would still be an indefensible policy to subject him to liability to the owner without releasing him from the obligation to make delivery to the plaintiff. Therefore, the law permits him to hold the property a reasonable time to procure indemnity from the plaintiff in the action, and, if the plaintiff fails to give him such indemnity, he need not deliver the property to such plaintiff, or keep it himself, but may return it to the defendant from whom he originally took it: *Haskins v. Kelly*, 1 Abb. Pr., N. S., 63, 70; *Edgerton v. Ross*, 6 Abb. Pr. 189-191. In such a case he is not liable to the claimant at all. What renders him liable is a delivery of the property to the plaintiff in the replevin action after he has been served with the notice specified in section 5341; and, of course, it makes no difference with respect to such liability whether the plaintiff does or does not indemnify him. That provision of the law is for his benefit, and it may be waived by him. He may be satisfied with the responsibility of such plaintiff, and therefore be willing to deliver the property to him

on his promise of indemnity, without obtaining the security of sureties upon an indemnity bond. But he may refuse to make such delivery unless he is indemnified, and escape all liability by promptly delivering the property to the defendant in the replevin suit, from whose possession he took it on the requisition. The statute appears to have been framed in part for the purpose of allowing the plaintiff in replevin to determine whether he is willing to incur, by taking possession of the ³⁹ property under the requisition, the hazard of a double liability when the property is claimed by a third person—the liability to restore it to the defendant in case of defeat in the replevin suit, and the liability to the sheriff on the indemnity bond in case the claimant makes good his title to the property, and recovers a judgment against the sheriff. If this risk is too great in his judgment, he may relinquish the further prosecution of his claim and delivery proceedings in the action, and proceed with the case as though they had not been originally instituted. He is deemed to have relinquished such proceedings if, after a reasonable time, he fails properly to indemnify the sheriff. In this event the sheriff must restore the property to the defendant in the replevin action, unless he is willing to take the risk of a delivery to the plaintiff. It is true that the statute does not in terms so declare; but this is made his duty by necessary implication from its terms. In case he is not indemnified, he need not keep the property or deliver it to the plaintiff. To whom shall he deliver it? To the claimant who has not instituted any action to establish his rights, who is not a party to the replevin action, who was not originally in possession of the property, and who gives no security either to the defendant from whom the property was taken or to the sheriff or to anyone at all? Such a construction of the statute would be monstrous. Nor does the language of the section permit such an interpretation. It merely declares that, on failure of the plaintiff to give security, the sheriff need proceed no further with the execution of the requisition. Thereafter he need not deliver the property to the plaintiff, or keep it himself; and it follows that he must restore it to its former possessor, there being no direction in the statute that he hand it over to the claimant. That the statute does contemplate that the sheriff shall be liable if, after notice, he delivers the property to the plaintiff, is obvious, and the authorities so hold: *Manning v. Keenan*, 73 N. Y. 45; *Manning v. Keenan*, 9 Hun, 686. But this liability is for conversion, and not in replevin. It was never intended by this section to abrogate by implication the doctrine

that property in custody of the ⁴⁰ law cannot be replevied. The statute contemplates that there shall be no liability on the part of the sheriff at all until a reasonable time has elapsed in which to procure indemnity from the plaintiff; and that, as soon as this is done, he will deliver the property to the plaintiff in the replevin action. How could the sheriff be sued in replevin after he had parted with possession of the property? Moreover, the sheriff is charged with a duty with respect to the property in his hands, despite the fact that it has been claimed by a stranger to the suit. If the plaintiff indemnifies him, and the defendant does not rebound, he must deliver it to the plaintiff. If the plaintiff does not indemnify him or the defendant does rebound, he (the sheriff) must deliver it to the defendant. In any event, he must, as an officer of the court, under the mandate of the law, surrender it to one of the parties to the litigation. The law is not so unreasonable as to exact from him the performance of a duty, and yet place it in the power of another to render impossible, or at least burdensome and difficult, the performance by him of such duty.

It appears in this case that the defendant, as sheriff, took the property from the possession of the plaintiff in this action, and not from the possession of the defendant in the first replevin suit. Under such circumstances, it is the rule that the officer cannot justify his seizure under the writ. It commands him to take the property described from the possession of the defendant in the action only. By wresting it from another who has control over it, he becomes a trespasser if it is in fact the property of such third person: *Otis v. Williams*, 70 N. Y. 208; *Bullis v. Montgomery*, 50 N. Y. 352. This, however, does not show that replevin will lie against him. In the replevin suit in which he took the property, the defendant in such action may set up his possession at the time of suit, and recover judgment against the plaintiff therein. The court may find, either on an admission of the fact or in a contest with respect to the question of possession, that the defendant was in fact in possession. The sheriff must proceed on the theory that this contingency is possible, and in fact it is usually probable. ⁴¹ He must, therefore, keep and deliver the property on the hypothesis that, in the course of that litigation, this fact will, or at least may, be established. A finding in another replevin action, to which the parties to the original suit are not parties, that the sheriff took the property from the possession of the plaintiff in the second replevin action, and not from the control of the defendant in the

first replevin suit, would not bind the parties to the first suit, and therefore would not affect their right to demand that the sheriff keep and deliver the property as directed by law; the fact being established in that case that the property was taken from the defendant in that action. If their rights to insist upon the discharge of this official duty by the sheriff is in no manner affected by the finding of the court in the other case, how can the sheriff be disturbed in a possession absolutely indispensable to enable him to perform such duty?

This same argument applies to the claim that the sheriff in this case, in seizing the property in the first replevin action, took not only the wheat specified in the requisition, but also some that was not therein described. This presents a question of identity. Doubtless, the sheriff is liable in conversion for the wheat taken without right. But the property is in fact in custody of the law. If it is the very wheat described in the requisition, the sheriff is charged with a duty with respect to it; and that duty is, so far as the possession of the property is concerned, a duty owing to the parties to the first replevin action, and not to the plaintiff herein or anyone else. The finding in this case that it is not the identical property in no manner settles that issue as against either of the parties to the first action. They still have a right to claim and show that it is the very property described in the requisition, and such may be the fact. If it is the identical property, the sheriff is bound to keep and deliver it according to the statute. He must, therefore, be allowed to retain possession of it in order to respond to the parties to the first action, on the theory that it is the property to which the replevin action relates. To interfere with his possession is to prevent his delivery of the property to ^{the} the proper party to the first suit, although the property is shown in that action to be the very property which that action is instituted to recover. Moreover, even if the wheat is not that which the plaintiff in the first action intended to reach, still the property is in custody of the law, for the defendant therein has a right to the return thereof. The law, having taken it from him, will not permit a stranger to take it from the sheriff, who, if the defendant rebounds, must restore it to him whoever may be the owner thereof, and without any reference to any question of identity. It is obvious that, if a second replevin action is allowed to be commenced at all against the sheriff under any conceivable circumstances, he will be bereft of that protection in the discharge of his duty which the law should throw around him. In a replevin

action the interference with the sheriff's possession comes at the very outset of the case, as claim and delivery proceedings may be, and almost invariably are, instituted simultaneously with the action itself. Once permit the second action to be brought against the sheriff while holding the property as sheriff, and he will in every instance in which the second suit is commenced be disturbed in his possession long before it can ever be known whether the property was taken from the possession of the defendant in the first action, or is the identical property sought to be replevied, or whether it belongs to the plaintiff in the second suit at all. The only safe doctrine is to treat the seizure or attempted seizure of the property in a second action as a contempt of court, and hold that the sheriff may lawfully resist all interference with his possession. That it was contempt of court at common law to replevy property in the custody of a sheriff was well settled: Cobby on Replevin, sec. 299, and cases cited in note 4. It is true that the old doctrine that property seized under execution is not in custodia legis as against the real owner has been in many states withdrawn; and in some jurisdictions replevin will lie against the officer even in favor of the defendant in execution when the property seized is exempt. But these cases merely modify the old doctrine that property is under such circumstances in custodia legis. They do not in any ⁴³ manner affect the proposition that if, in a particular case, the property is in fact in the custody of the law, any interference with the sheriff's possession thereof is a contempt of court. There is no statute in this state which either expressly or by implication alters the doctrines of the common law that property in the hands of an officer in a replevin action is in the custody of the law, and that to wrest such possession from such officer is a contempt of court. Nor has the true owner of the property any reason to complain. If it is taken from his possession in a replevin action against a stranger, he may immediately sue in conversion, and hold the sheriff and his official bonds responsible for the tort. While there is a dispute among the authorities whether the sureties on a sheriff's bond are liable for the wrongful act of their principal in seizing the property of a third person, the more numerous decisions are found arrayed in support of the rule that they are liable, and these cases appear to us to have the best of the argument: See *Lammon v. Feusier*, 111 U. S. 17, where the authorities are reviewed, and where the doctrine we deem sound is enunciated. If the property was taken from the possession of the defendant in the replevin action, the true

owner, on making claim under the statute, may hold the sheriff and his bond liable if he delivers the property to the plaintiff; and, if he returns it to the defendant, the claimant is in the precise position with respect to all rights which he occupied before the replevin suit was commenced. He has merely been deprived a few days of his right to sue in replevin for the property. Whatever other rights he had before the seizure are unaffected thereby, and it is probable that as soon as this brief period has passed, and the property is in the possession of either party to the replevin suit, the real owner may vindicate his title to the same by an action for possession, as well as an action for damages. If he proceeds under the statute, the statute will not allow the sheriff, even when he takes the property from the possession of the defendant in the replevin action, to transfer the possession to another—i. e., the plaintiff—and thus change the person⁴⁴ against whom the owner must carry on his replevin action, without subjecting himself and his sureties to liability for the value of the property; and, if the sheriff takes it from the true owner himself, he and his bondsmen are instantly liable for the damages such owner sustains.

We do not wish to be understood as holding that, after a reasonable time has expired in which to obtain indemnity from the plaintiff in a replevin action, the sheriff is not liable merely because he retains possession of the property. To protect himself from liability thereafter, he must surrender the property to the defendant in the replevin suit. In other words, it is not our purpose to hold that replevin will not lie against the sheriff after it has become his duty to deliver the property to one of the parties to the first replevin suit, and he fails after a reasonable time to make such delivery. Thereafter he cannot claim the protection of the law, for he does not need it. It is his own wrong that renders him liable in such a case. He may then be sued in conversion or in replevin. So long as he is acting as sheriff, charged with a duty with respect to the property, the law will not permit his possession to be interfered with. But when, after a reasonable time in which to perform his duty, and thus shield himself from liability in a replevin action, has passed, he is still found in possession of the property, he is not acting as sheriff, and the property is not in custody of the law. It is in the same position with respect to a second replevin action that property replevied is after it has been delivered to one of the parties to the action. In such a case, the better rule is that a second replevin suit will lie against the party in possession; and

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FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE—FRAUDULENT PAYMENTS.—A grantee of real estate who, before full payment, receives knowledge that the conveyance was fraudulent on the part of his grantor, makes further payments at his peril, even on his note, not yet due, which his grantor holds for the unpaid balance. As to such payments the grantee is regarded as a participant in the fraud, and the conveyance may be set aside *pro tanto* at the suit of the grantor's creditors.

FRAUDULENT CONVEYANCES—INNOCENT GRANTEE—PAYMENTS.—A grantee's conveyance protects him, as against the grantor's creditors, to the extent of all payments innocently made in ignorance of the fraud of his grantor, and if a decree is entered directing the sale of the land to satisfy a judgment against the grantor, it should provide that from the proceeds of the sale the grantee be first reimbursed in full for all payments made by him prior to his knowledge of the grantor's fraud. It is only as to the excess over such payments that the rights of the grantor's creditors are superior to the rights of the grantee.

VENDOR AND PURCHASER—NOTE FOR PURCHASE PRICE—PAYMENT.—The execution and delivery of negotiable paper for the purchase price of land, or any part thereof, does not constitute payment as between the grantor and grantee, so long as such paper remains in the hands of the grantor.

M. A. Hildreth, for the appellant.

Benton & Bradley, for the respondent.

²⁷⁷ BARTHOLOMEW, J. The plaintiff, Fluegel, is a judgment creditor of the defendant Frank Henschel. Execution on said judgment having been returned *nulla bona*, he brought his action to ²⁷⁸ set aside as fraudulent the conveyance of a certain quarter section of land, made by Frank Henschel and Julia Henschel, his wife, to F. W. Froemke. Froemke is a brother

and was a mere nominal defendant. He was not a party to the fraud against him, and he made no appearance in answer of the other defendants.

The conveyance was made by the defendants at their part to defraud the plaintiff, and the finding of fact was as follows: "That the plaintiff purchased the land described in the complaint in good faith, and for a valuable consideration, without knowledge whatever of any intent to defraud the plaintiff, by Frank Henschel and Julia A. Henschel, and any creditors or other persons out of him, or either of them, and without any circumstances sufficient to put him on inquiry as to the fact that it was the intention of the defendants and Julia A. Henschel, in making

the sheriff cannot defeat the right of the claimant to maintain replevin by withholding such possession, but, on the contrary, he himself becomes liable to be sued in replevin if he does not, in a reasonable time after his duty to do so arises, deliver the res to the party to the first action entitled thereto.

The judgment is reversed, and a new trial is ordered.

All concur.

REPLEVIN AGAINST OFFICER.—The general rule is, that if an officer, either by mistake or design, levies on goods, not the property of the defendant named in his writ of execution or attachment, or if the property for any reason is not liable to be taken on the writ, replevin will lie against him at the instance of the injured party, no matter from whose possession the goods were so taken: Extended note to *Carpenter v. Innes*, 25 Am. St. Rep. 257; extended note to *Kellogg v. Churchill*, 9 Am. Dec. 105-107. Replevin may be maintained against a sheriff who holds property by virtue of a writ in another action of replevin then pending and undetermined, and also against the plaintiff in such suit, where the plaintiff in the latter suit is not a party to the first: *Relley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737. Compare *Hagan v. Deuell*, 24 Ark. 216; 88 Am. Dec. 769.

CONTEMPT—REPLEVIN OF PROPERTY IN CUSTODY OF LAW.—A defendant in execution is guilty of contempt if he institutes replevin to recover property rightfully levied on by virtue of the writ: *Phillips v. Harriss*, 3 J. J. Marsh. 122; 19 Am. Dec. 166. It is held that the principle that goods so taken are in the custody of the law, and cannot be replevied, applies only between the officer and the defendant from whose possession they are taken: *Dunham v. Wyckoff*, 3 Wend. 280; 20 Am. Dec. 695, and note. It is well settled that property cannot be placed in the custody of law by an unauthorized levy: Extended note to *Kellogg v. Churchill*, 9 Am. Dec. 105.

FLUEGEL v. HENSCHER.

[7 NORTH DAKOTA, 276.]

FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.—If a conveyance of real estate is made to one not a creditor of the grantor, and the grantee knows at the time that the grantor intends by such transfer to hinder, delay, or defraud his creditors, the mere consummation of such transfer, even though based upon full consideration, is such a participation in the fraud by the vendee as invalidates the transfer against existing creditors.

FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.—In a conveyance of real estate to defraud creditors, knowledge on the part of the grantee of such suspicious facts and circumstances as would put a prudent man on inquiry is equivalent to knowledge of all facts that would have developed the fraudulent intent of the grantor by a reasonable pursuit of such inquiry; but no duty of inquiry devolves upon the grantee unless he is in possession of such suspicious facts or circumstances.

FRAUDULENT CONVEYANCES BETWEEN RELATIVES—PRESUMPTION.—The fact that the vendor and vendee in a conveyance of real estate are relatives does not raise any presumption of fraud in the transaction in favor the creditors of the vendor.

FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE—FRAUDULENT PAYMENTS.—A grantee of real estate who, before full payment, receives knowledge that the conveyance was fraudulent on the part of his grantor, makes further payments at his peril, even on his note, not yet due, which his grantor holds for the unpaid balance. As to such payments the grantee is regarded as a participant in the fraud, and the conveyance may be set aside pro tanto at the suit of the grantor's creditors.

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M. A. Hildreth, for the appellant.

Benton & Bradley, for the respondent.

277 BARTHOLOMEW, J. The plaintiff, Fluegel, is a judgment creditor of the defendant Frank Henschel. Execution on said judgment having been returned nulla bona, he brought his action to **278** set aside as fraudulent the conveyance of a certain quarter section of land, made by Frank Henschel and Julia Henschel, his wife, to F. W. Froemke. Froemke is a brother to Mrs. Henschel. Crozier was a mere nominal defendant. Nothing was claimed as against him, and he made no appearance. All the allegations of fraud contained in the complaint were put in issue by the joint answer of the other defendants. The trial court found that the conveyance was made by the Henschels with intent on their part to defraud the plaintiff, Fluegel. But the eighth finding of fact was as follows: "That the defendant F. W. Froemke purchased the land described in the fourth finding of fact in good faith, and for a valuable consideration, and without any knowledge whatever of any intent on the part of the defendants Frank Henschel and Julia A. Henschel to delay or defraud any creditors or other persons out of their demands against them, or either of them, and without any knowledge of facts and circumstances sufficient to put a prudent man upon inquiry as to the fact that it was the intention of the said Frank Henschel and Julia A. Henschel, in making

such transfer, to delay and defraud creditors or other persons out of their demands against them, or either of them." Upon this finding, and the conclusion of law that necessarily followed, judgment was entered dismissing the complaint, with costs. From this judgment plaintiff appeals, and the case comes into this court for trial de novo.

Of the findings made, only the eighth is attacked; hence we need only consider the evidence in relation to that one finding. And it will be conceded, because nothing more is claimed, that we need consider the evidence only in its bearing upon two propositions: 1. Did the grantee, Froemke, at the time he made the purchase, have knowledge of the fraudulent intent of the grantors in disposing of the land? It is, we think, the prevailing and correct rule that, where a conveyance is made to one not a creditor, and the grantee knows at the time that the grantor intends by such transfer to hinder, delay, or defraud his creditors, that mere consummation of the transfer under such ²⁷⁹ circumstances, even though based upon full consideration, is such a participation in the fraud by the vendee as will invalidate the transfer against existing creditors: *Wood v. Chambers*, 20 Tex. 247; 70 Am. Dec. 382; *Craig v. Zimmerman*, 87 Mo. 475; 56 Am. Rep. 466; *Chapel v. Clapp*, 29 Iowa, 191; *Liddle v. Allen*, 90 Iowa, 738; *Biddinger v. Wiland*, 67 Md. 359; *Smith v. Collins*, 94 Ala. 394; *Metropolitan Bank v. Durant*, 22 N. J. Eq. 35; *Hathaway v. Brown*, 18 Minn. 414; *Hough v. Dickinson*, 58 Mich. 89; *Kansas Moline Plow Co. v. Sherman*, 3 Oklahoma, 204. And 2. Did the grantee, at the time of the transfer, have knowledge of such facts and circumstances as would put a prudent man upon inquiry, and which inquiry, if reasonably pursued, would have developed the fraudulent intent of the grantor? In law, knowledge of such suspicious facts or circumstances is equivalent to knowledge of whatever might have been learned by a reasonable pursuit of the inquiry suggested: *Jones v. Hetherinton*, 45 Iowa, 681; *Rindskopf v. Myers*, 87 Wis. 80; *Dyer v. Taylor*, 50 Ark. 314; *Holliday case*, 27 Fed. Rep. 830; *Dodd v. Gaines*, 82 Tex. 429; *Eureka Iron etc. Works v. Bresnahan*, 66 Mich. 489; *Hanchett v. Kimbark*, 118 Ill. 121. But there is great danger of pressing this rule too far. The law casts upon the vendee no duty to inquire into the motives or circumstances of his vendor unless he is in possession of such suspicions, facts, or circumstances: *State v. Merritt*, 70 Mo. 276; *Baker v. Bliss*, 39 N. Y. 70; *Stearns v. Gage*, 79 N. Y. 102; *Woodworth v. Paige*, 5 Ohio St. 70; *Tuteur v. Chase*, 66 Miss. 476; 14 Am. St. Rep.

577; *Kemmerer v. Tool*, 78 Pa. St. 147. In this case the grantee testifies that he had no knowledge of any fraudulent intent upon the part of the grantor; that he had no knowledge that the grantor was indebted in any sum whatever except the sum of eight hundred dollars, which was secured by a mortgage upon the premises purchased, and which the grantee assumed; and that he had no knowledge of any fact or circumstance that led him to believe or suspicion that the grantors had any fraudulent intent in making the transfer; that ²⁸⁰ the consideration paid (two thousand five hundred dollars) was the fair value of the premises, and that it was paid by assuming the mortgage of eight hundred dollars, and paying four hundred dollars in cash, and two promissory notes, one for five hundred dollars and one for eight hundred dollars, executed by the grantee to the grantor. There is no direct testimony tending to contradict the grantee in any manner whatever, but appellant claims that certain admitted facts show that he had sufficient knowledge to arouse his suspicions, and put him upon inquiry. The first circumstance seized upon by appellant is the fact that the grantor and grantee were brothers in law. But the fact that the vendee and vendor are relatives should not, in our judgment, raise any presumption of fraud in the transaction, and this is the holding of the courts: *Blish v. Collins*, 68 Mich. 542; *Fraser v. Passage*, 63 Mich. 551; *Tompkins v. Nicols*, 53 Ala. 197; *Steele v. Ward*, 25 Iowa, 535; *Cooper v. Martin Brown Co.*, 78 Tex. 219. It is true that it is held in some jurisdictions that, where a husband conveys to a wife, and the transfer is attacked by creditors, the burden of proof shifts, and the wife is held to show the bona fides of the transaction (*Hooser v. Hunt*, 65 Wis. 71; *Reese v. Shell*, 95 Ga. 749), and in one case—*Satterwhite v. Hicks*, Busb. 105, 57 Am. Dec. 577—this rule was applied when the parties were brothers in law. The application of this rule would, however, make no difference in our decision of this case.

It also appears that after the *lis pendens* in this case was filed, but before the service of summons upon him, Froemke transferred the land to William Henschel, a brother to Frank Henschel. This was nearly a year after Froemke purchased; but we see nothing in this fact that throws any light upon the question of Froemke's knowledge at the time he purchased. This last transfer seems to have been in the usual course of business. Froemke bought the land on speculation, and sold it at an advance of five hundred dollars. He testifies that at the time he

sold it he knew nothing of the *lis pendens*, or of the commencement of this action.

Another circumstance upon which appellant places much ²⁸¹ reliance is the fact that there was a discrepancy between the date of the notes and the deed on one hand and the acknowledgment of the deed on the other, while the evidence clearly shows that the papers were all drawn, acknowledged, delivered, and the cash payment made at the same time and place. The original action upon which plaintiff obtained judgment against Henschel was commenced on Monday, February 24, 1896. On that date the summons was served upon Henschel by leaving the same at his residence. The evidence shows that on February 23d Henschel and his wife had driven from their home across the country, about thirty miles, to Mrs. Henschel's father's home. This was in the immediate vicinity of Froemke's residence. On Wednesday, the twenty-sixth day of February, Froemke and the Henschels went to an attorney's office, where the notes were drawn and executed, and the deeds drawn and acknowledged, and the cash payment made. The notes and deeds were dated February 24th, while the acknowledgment was dated February 26th. It is the theory of appellant that Henschel had learned in some manner of the commencement of the action, and that he had the papers dated back in order that they might appear to antedate the bringing of the suit. We think it a sufficient answer to this to state that there is no evidence whatever to show that Henschel had any such knowledge. He swears he had not. The deed did not in fact antedate the action, while it might just as well have done so had there been any ulterior purpose in the matter. All the parties testify that nothing was delivered, and no cash paid, until the 26th; and the mere fact of antedating the deed would be a subterfuge so useless that we cannot presume the most ignorant would have recourse to it. Moreover, it is established that this transfer had been arranged weeks before, and everything settled except the amount of the cash payment. On February 14th, Froemke wrote Henschel, saying, in effect, that he found that he could make the cash payment larger than he thought when they talked, and requesting Henschel to come over soon, as he was anxious to close the matter up. This letter was ²⁸² introduced in evidence, and the envelope in which it was mailed. Under these circumstances, even if Froemke knew of the discrepancy—which is very doubtful under the testimony—we do not think the fact is of such a suspicious character that any duty of inquiry was thrown upon the grantee. We are

therefore of the opinion that this finding of fact was fully warranted under the evidence, and should not be disturbed.

But upon another point we are constrained to reverse the judgment of the trial court. It is undisputed in this case (Froemke himself so testifies) that the promissory note of eight hundred dollars, given by Froemke to Henschel as a part of the purchase price of said land, was paid by Froemke, the grantee, to Henschel, the grantor, after this action had been commenced by service of summons on all the defendants, and before the maturity of the note. No finding of fact was made upon this matter in the lower court, nor was any such finding asked. The point does not seem to have been called to the attention of the court, but it is urged here, and, as we try the case *de novo*, we cannot ignore it. However innocent of all knowledge of Henschel's intent to defraud Froemke may have been prior to the service of such summons upon him, after such service he was, in law, chargeable with such knowledge. Thenceforth he was bound to make no further payments to his grantor, because whatever might be owing to the grantor belonged in justice and equity to the creditors whom he defrauded. A grantee, who, before full payment, receives knowledge that the transfer was fraudulent on the part of his grantor, makes further payments to his grantor at his peril. As to such payments he is regarded as a participant in the fraud, and the conveyance may be set aside *pro tanto*: *Crawford v. Kirksey*, 55 Ala. 282; 28 Am. Rep. 704; *Rhodes v. Green*, 36 Ind. 7; *Perkins v. Swank*, 43 Miss. 349; *Hedrick v. Strauss*, 42 Neb. 485; *Davis v. Ward*, 109 Cal. 186; 50 Am. St. Rep. 29; *Jewett v. Palmer*, 7 Johns. Ch. 65; 11 Am. Dec. 401; *Frost v. Beekman*, 1 Johns Ch. 298; *Arnholt v. Hartwig*, 73 Mo. 487. The grantee's conveyance will protect him to the extent of all payments innocently made, in ignorance of the fraud ²⁸³ of his grantor; and where a decree is entered directing the sale of the land to satisfy a judgment against the grantor, the decree should provide that from the proceeds of the sale the grantee be first reimbursed in full for all payments made by him prior to his knowledge of his grantor's fraud. It is only as to the excess over such payments that the rights of the grantor's creditors are superior to the rights of the grantee: See cases cited *supra*, and also *Kitteridge v. Chapman*, 36 Iowa, 348; *Green v. Green*, 41 Kan. 472; 16 Am. & Eng. Ency. of Law, 838, note; *Clemens v. Moore*, 6 Wall. 299; *Sargent v. Eureka etc. Apparatus Co.*, 46 Hun, 19.

But it is urged in this case that the grantee had executed and

delivered to the grantor his negotiable promissory note for the unpaid balance; and that, since the grantor might at any time transfer such note to an innocent purchaser, in whose hands the grantee would be compelled to pay it, therefore he had the right to protect himself against the note by payment to the grantor at any time before maturity, and that it would be unjust to him to require him to pay it again, or, in default, have his deed set aside. But, if he suffer any hardship, he has brought it upon himself. In this case the grantor was a party to the action; he was before the court. If he had the note in his possession or under his control, he could be compelled to surrender it for cancellation. No injustice could have been done to the grantee. This the grantee must have known. He also knew that the grantor still held the note. To sanction a payment, such as was made in this case and in anticipation of a transfer of the note, would open a palpable door for fraud. The authorities are practically uniform in holding that the execution and delivery of negotiable paper for the purchase price, or any part thereof, does not constitute payment as between the grantor and grantee so long as such paper remains in the hands of the grantor: *Freeman v. Deming*, 3 Sand. Ch. 327; *Partridge v. Chapman*, 81 Ill. 137; *Baldwin v. Sager*, 70 Ill. 503; *Rush v. Mitchell*, 71 Iowa, 333; *Paul v. Fulton*, 25 Mo. 163; *Dixon v. Hill*, 5 Mich. 404; *Davis v. Ward*, 109 Cal. 186; 50 Am. St. Rep. 29; *Kitteridge v. Chapman*, 36 Iowa, 348; *Arnholt v. Hartwig*, 73 Mo. 487. ²⁸⁴ Following these authorities as applied to undisputed facts in this case, justice required a different decree from that ordered by the trial court. Of course, no decree can be rendered, as the case now stands, affecting the rights of the defendant Crozier, who held the prior mortgage on the land in controversy, the validity of which is in no manner questioned. The district court of Cass county is directed, on application, to set aside the decree heretofore ordered in this case, and order a decree setting aside and canceling the deed made by the defendants Frank Henschel and wife to the defendant Froemke, and hereinbefore more particularly described, as against the plaintiff, William Fluegel, and establishing a lien upon the land in said deed described in favor of the defendant Froemke for the sum of four hundred dollars, being the amount of the cash payment made at the time of the delivery of said deed, and the further sum of five hundred dollars, paid by Froemke to Henschel on the purchase price of said land, prior to any notice to Froemke of the intent to defraud on the part of his grantor, and which said lien so established shall be prior

and superior to the lien of the judgment of the plaintiff, Fluegel, against the defendant Frank Henschel. The plaintiff will recover his costs and disbursements in both courts.

Reversed.

All concur.

FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.—Even though an assignee of property pays a valuable and full consideration, yet if the assignor assigns for the purpose of defeating the claims of creditors, and the assignee knowingly assists in effectuating such fraudulent intent or even has notice thereof, he will be regarded as a participator in the fraud: *Beldler v. Crane*, 135 Ill. 92; 25 Am. St. Rep. 349. If a transfer is made with such intent, and the intent is known to the grantee, or could have been known from facts within his knowledge, and sufficient to put a prudent man on inquiry, and which, by the use of ordinary diligence on his part, would have led to a knowledge of the fraudulent intent of the seller, the transfer is fraudulent and void as to creditors, although a full consideration is paid: See monographic note to *State v. Mason*, 34 Am. St. Rep. 399.

FRAUDULENT CONVEYANCES—EVIDENCE OF FRAUD—RELATIONSHIP.—Relationship between an insolvent debtor and a preferred creditor is a fact to be considered by the jury on the question of intent to defraud creditors: *Van Raalte v. Harrington*, 101 Mo. 602; 20 Am. St. Rep. 626; *Hanson v. Bean*, 51 Minn. 546; 38 Am. St. Rep. 516; but a presumption of fraud is not raised thereby: *Kitchen v. McCloskey*, 150 Pa. St. 376; 30 Am. St. Rep. 811; note to *Hanson v. Bean*, 38 Am. St. Rep. 519.

FRAUDULENT CONVEYANCES—PAYMENTS MADE WITH KNOWLEDGE OF FRAUD.—A fraudulent grantee, whose title to land is annulled by a court of equity, is not entitled to be reimbursed for purchase money paid by him of his own wrong and in furtherance of an actual fraud: *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656. An innocent purchaser from an insolvent debtor selling in fraud of his creditors, who only pays part of the consideration in cash, and gives his note for the balance, will be protected only to the extent of the payment actually made, unless the note is negotiable; and the burden of proof is upon him to show its negotiability: *Tillman v. Heller*, 78 Tex. 597; 22 Am. St. Rep. 77, and note.

WILSON v. RUSTAD.

[7 NORTH DAKOTA, 330.]

CONFLICT OF LAWS.—CHATTEL MORTGAGES executed in one state between parties domiciled therein, on property situated there and filed for record in that state, enable the mortgagee to claim the protection of the laws of that state in another state to which the property is removed and there sold or disposed of.

CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION—WHO MAY QUESTION.—The question of the sufficiency of the description of property in a chattel mortgage is one of law and not of fact, and, if such description is sufficient as between the mortgagor and mortgagee, it cannot be questioned by a stranger to the title of the mortgagor. The sufficiency of such description can be questioned only by a purchaser in good faith from the mortgagor or his vendee, or by one who claims protection under the law requiring chattel mortgages to be recorded.

J. B. Howland and McCumber & Bogart, for the appellant.

W. E. Purcell and H. C. N. Myhra, for the respondent.

⁸³¹ CORLISS, C. J. Plaintiff is seeking to recover possession of certain personal property by virtue of a mortgage executed thereon by the owners thereof. The mortgage was executed in South Dakota, where the property was then situated. Both the mortgagors and the mortgagee were at that time domiciled in that state. The instrument was filed in the proper office under the laws of that state. Subsequently, the mortgaged chattels were brought to this state, and they were found in the possession ⁸³² of the defendant, Rustad, at the time this action was commenced. There appears to have been a controversy on the question of fact whether the property taken from defendant Rustad, in this action was the property described in the mortgage, but, inasmuch as there was another question which we think was erroneously submitted to the jury, it is impossible to determine from the verdict whether the jury found the issue as to identity against the plaintiff, or whether the jury did not base their verdict altogether on the question which should not, under the evidence, have been submitted to them. For the purpose of deciding this appeal, we must assume that the jury have found in plaintiff's favor on the question of identity, but have found against him on the other point. While there is some authority contrary to the doctrine, yet the great majority of the decisions hold that a chattel mortgage, under circumstances similar to those which exist in this case, continues to be a lien as to the whole world, although the property is taken to a foreign jurisdiction, and there disposed of: Jones on Chattel Mortgages, secs. 299, 301, 303; Cobb v. Buswell, 37 Vt. 337; Jones v. Taylor, 30 Vt. 42; Taylor v. Boardman, 25 Vt. 581; Norris v. Sowles, 57 Vt. 360; Bank v. Lee, 13 Pet. 107; Mumford v. Canty, 50 Ill. 370; 99 Am. Dec. 525; Hornthall v. Burwell, 109 N. C. 10; 26 Am. St. Rep. 556; Keenan v. Stimson, 32 Minn. 377; Ferguson v. Clifford, 37 N. H. 86; Kanaga v. Taylor, 7 Ohio St. 134; 70 Am. Dec. 62; Wilson v. Carson, 12 Md. 54; Smith v. McLean, 24 Iowa, 322; Martin v. Hill, 12 Barb. 631; Rhode Island Cent. Bank v. Danforth, 14 Gray, 123; Langworthy v. Little, 12 Cush. 109; Feurt v. Rowell, 62 Mo. 524; Simms v. McKee, 25 Iowa, 341; Ballard v. Winter, 39 Conn. 179; Cool v. Roche, 20 Neb. 550; Beall v. Williamson, 14 Ala. 55; Iron Works v. Warren, 76 Ind. 512; 40 Am. Rep. 258; Barrows v. Turner, 50 Me. 127; Handley v. Har-

ris, 48 Kan. 606; 30 Am. St. Rep. 322; Offutt v. Flagg, 10 N. H. 47; Hall v. Pillow, 31 Ark. 32. If, therefore, it appeared in this action that the defendant was a bona fide purchaser from the mortgagors, or from some one to whom they had sold the property, still he would be chargeable with notice of the mortgage thereon, provided such property was therein described with ³³³ a sufficient accuracy. It is on the theory that he was such a purchaser that the district court charged the jury that, if they found the description of the property in the mortgage so faulty and defective that such description would not enable a third party, aided by such inquiries as the mortgage itself would suggest, to identify the property, it would be void as to defendant. No such accuracy in description is required as between the parties. And an utter stranger to the title of the mortgagor certainly cannot be in a better position than is the mortgagor himself. If one without shadow of right as against the mortgagor takes possession of the property, he cannot be heard to object that the description is insufficient, so long as it is sufficient as between the parties. We are clear that the description in the mortgage in question was good, at least as against the mortgagors themselves, and this is conceded by counsel for defendant. The defendant, therefore, cannot raise the point of insufficiency unless he purchased the property in good faith from the mortgagors, or some one to whom they had sold it. The law sends one who is about to buy chattels to the public records to ascertain if they are incumbered. If he finds there no mortgage, it cannot be set up as against his title. So, if he finds a mortgage with a faulty description, he is protected because the record fails to give him notice of the lien. It does not point out with sufficient accuracy the particular property which the mortgage embraces. But the public record of a mortgage is not made for the benefit of one who in no manner connects himself with the title of the mortgagor as purchaser, encumbrancer, or attaching or execution creditor. The mortgage is good as to such a one without filing, and it is likewise good as to him though the description be defective: See Cobbey on Chattel Mortgages, sec. 186. In this case we are unable to discover any evidence tending to show that defendant purchased the property from the mortgagor, or from one to whom they had sold it. When the plaintiff had shown the ownership of the property by the mortgagors, and their execution of the mortgage thereon to him, he had made out a case. It was then incumbent ³³⁴ on defendant to show that such mortgage was void as to

him. All the evidence on that point in this record is that the property was in the possession of one Herb Vail, who sold it to defendant. Whether Vail had bought it from the mortgagors, or had authority from them to sell it, does not appear. Defendant is in no better position than Vail himself would have been had the action been brought against him before he had sold to defendant, and the only evidence in the case was that Vail had possession of the property. Such evidence would not overcome the case made by plaintiff, as it would have no tendency to show that Vail was an innocent purchaser of the property, and entitled as such to question the sufficiency of the description. The only question which should have been submitted to the jury was the question of identity. Indeed, even if we should assume that defendant was an innocent purchaser, we are unable to discover anything in the description of the property which would warrant a court in leaving the question of sufficiency of description to the jury as a question of fact. The property is described in the mortgage as follows: "One horse mule, three years old, color bay, weight about nine hundred and fifty pounds, named Jack; one mare mule, three years old, color brown or mouse, weight about one thousand pounds, named Jennie; one mare mule, five years old, color mouse, weight about eight hundred pounds, named Maud—all this day purchased from the said E. F. Wilson, with all increase of same; all the said property being now in the possession of the said mortgagor in the county of Day and state of South Dakota." Such a description is good as against third persons: See Cobbey on Chattel Mortgages, secs. 170, 171, 178; Union Nat. Bank v. Oium, 3 N. Dak. 193; 44 Am. St. Rep. 533. See, also, cases cited in note to Barrett v. Fisch, 76 Iowa, 552; 14 Am. St. Rep. 238. Whether a description is sufficient is a question of law, and not of act: Austin v. French, 36 Mich. 199; Union Nat. Bank v. Oium, 3 N. Dak. 199; 44 Am. St. Rep. 533. This is assumed to be the law in every case: See the decisions reviewed in note to Barrett v. Fisch, 76 Iowa, 552; 14 Am. St. Rep. 238.

³³⁵ The judgment is reversed and a new trial is ordered.

Wallin and Bartholomew, JJ., concur in a reversal of this cause on the ground that the sufficiency of the description was a question for the court, and it was error to submit it to the jury, and express no views on other points discussed in the opinion.

CHATTEL MORTGAGES—CONFLICT OF LAWS.—A chattel mortgage executed in another state should be given such effect as it is entitled to in the state wherein it was executed: *Handley v. Harris*, 48 Kan. 606; 30 Am. St. Rep. 322, and note. A chattel mortgage valid under the laws of the state where it is executed, both as between the immediate parties thereto and as against third parties, is valid in another state to which the property has been removed, although not executed according to the laws of the latter state: *Craig v. Williams*, 90 Va. 500; 44 Am. St. Rep. 934; *Hornthal v. Burwell*, 109 N. C. 10; 26 Am. St. Rep. 556, and note.

CHATTEL MORTGAGES—DESCRIPTION—SUFFICIENCY.—A description in a chattel mortgage which is sufficient between the parties thereto may be utterly insufficient as against third persons; for, as between the parties, a specific and particular description is not necessary, and the mortgaged articles may be shown by parol evidence, while the mortgage, to be effectual as against third persons, must point out the subject matter of it, so that such persons, by it, and such inquiries as it suggests, may be able to identify the property intended to be covered: See monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 242.

MERCHANTS' NATIONAL BANK v. BRAITHWAITE.

[7 NORTH DAKOTA, 358.]

COURTS—STATE AND TERRITORIAL—ADMISSION OF STATE—JURISDICTION.—Upon the admission of a territory as a state, the judgments of the territorial courts pass under the jurisdiction of the state courts of similar jurisdiction, and the latter have power to issue execution thereon, and the judges thereof have authority to institute supplementary proceedings based on such judgments.

EXECUTIONS—SUPPLEMENTARY PROCEEDINGS—VACATING.—It is too late for a debtor to move to vacate all proceedings had supplementary to execution on the ground that the execution was not returned within the statutory period, when he has submitted to an examination, and the appointment of a receiver in such proceedings has already been made.

EXECUTIONS—SUPPLEMENTARY PROCEEDINGS—APPOINTMENT OF RECEIVER—OBJECTIONS TO.—The proper time to present reasons why a receiver should not be appointed in proceedings supplementary to execution is at the time when the application for his appointment is made, and if the objection to such appointment is overruled and no appeal is taken within the proper time, such objection cannot be raised on appeal from an order refusing to dismiss the proceedings and all orders thereunder.

LIMITATIONS—SHORTENING TIME WITHIN WHICH TO BRING ACTIONS.—The time within which to bring an action may be lessened by statute, as to existing causes of action, provided the suitor has still a reasonable time, after the law is passed, in which to commence his suit, and, upon the failure of the statute to fix such time, the court is to decide what is a reasonable time, which is to be computed from the day when such law was passed, and not from the time it took effect.

ACTIONS—SHORTENING TIME WITHIN WHICH TO COMMENCE.—It is not essential to the validity of a law shortening the time within which actions may be brought that it shall, as to existing causes of action, fix a certain time after its enactment

within which such actions must be enforced, provided the time actually left in which to sue is not unreasonable.

EXECUTIONS—SUPPLEMENTARY PROCEEDINGS ON EXPIRED JUDGMENT.—Although proceedings supplementary to execution are instituted while a judgment is alive and valid, they fall upon the death of the judgment by limitation, and may be set aside by the defendant on motion on the ground that the judgment has expired and is no longer valid.

EXECUTIONS.—SUPPLEMENTARY PROCEEDINGS ON CREDITORS' BILLS, though instituted during the life of a judgment, cannot continue such life beyond the statutory period.

Newton & Patterson, for the appellant.

Boucher & Philbrick and Cochran & Feetham, for the respondent.

³⁰³ **CORLISS, C. J.** This appeal is from two orders. One is an order denying defendant's motion to set aside certain orders in proceedings supplementary to execution, and granting to the plaintiff certain relief, not necessary to be now specified. The other order required defendant to deposit in court a sum of money as a condition of vacating a restraining order issued in such proceedings. The sweeping assertion is made by counsel for defendant that the proceedings and all orders therein are void for want of jurisdiction in the judge by whose order such proceedings were instituted and by whom the different orders therein have been made. The judgment on which such proceedings were based was recovered in the district court of the territory of Dakota in 1886, three years before statehood. The statute authorizing supplementary proceedings, which was then in force, was section 5174 of the Compiled Laws. This section declared that the order to examine the judgment debtor might be issued by the judge of the district court, and that all subsequent orders must be made by the same judge. The language of the statute is that the judge of the court having power to issue execution on the judgment, and out of which the execution was in fact issued, shall possess the power to make the order for the examination of the debtor and all subsequent orders. It is obvious that, as these proceedings are purely statutory in character, no other judge has any jurisdiction in the matter, because no other judge is named in the statute. It is urged that as the judgment is a judgment of a territorial court, and as that court has ceased to exist, no state court has any power to issue process to enforce such judgment ³⁰⁴ by execution. Hence it is insisted that the execution, which was in fact issued by the state court in 1890, is void, and that the proceedings based thereon

must necessarily fall to the ground for want of foundation. Moreover, it is claimed that, as the state court was not the court which could issue execution on the judgment, the judge thereof is not the judge who is authorized by section 5174 of the Compiled Laws (which was continued in force by the state constitution) to grant the order made in this case to examine the judgment debtor in supplementary proceedings. We cannot agree with counsel for plaintiff in this contention. The question is one of jurisdiction after statehood over the records and judgments obtained in actions brought in a territorial court. The jurisdiction which formerly was vested in the territorial court over such records and judgments, Congress must have intended to be transferred to some other tribunal. We cannot believe that it was the purpose of that body to take from a great mass of judgments in the various courts of the different territories mentioned in the enabling act all force save that of a conclusive adjudication, and compel the plaintiffs therein to go through the formality of bringing suit upon them in the courts of the different states to be admitted into the Union, the same as upon a foreign judgment or the judgment of a sister state. The old courts having jurisdiction over cases in which judgments had been ordered were to be swept away. New courts were to take their place possessing similar jurisdiction. Those judgments were judgments rendered within the same territory to be embraced within the new states. Why, under such circumstances, Congress should withhold its consent that the judgments should become the judgments of the state courts which should succeed to the same general jurisdiction as that of the territorial tribunals in which such judgments were rendered is inexplicable. That it did not withhold such consent is clear; and, even if we were in doubt on the point, our duty would be plain. It has been settled by an authority to which we must defer. In *Glaspell v. Northern Pac. R. R. Co.*, 144 U. S. 211, the federal supreme court held ³⁶⁵ that as to an action not pending at the time of the admission of North Dakota into the Union, but in which a judgment had been rendered in the territorial district court, there was no jurisdiction whatever in the federal court, but that exclusive jurisdiction of such a case was vested in the state district court, which was the successor of such territorial court. The case was remanded to the state district court, the federal supreme court holding that jurisdiction over the judgment in that action rendered by the territorial district court had been by the enabling act transferred to the state court.

The action in which the judgment was rendered on which are founded the supplementary proceedings, the validity of which are controverted, was not a pending action, within the meaning either of our statute or of the enabling act. The time to appeal therefrom had expired when the state was admitted, and, even if it had not yet expired, still the suit was not pending, because no proceedings looking to a new trial were then pending, nor has any step to review the judgment on appeal ever been taken in the case. In construing the enabling act, the court in the Glaspell case said that that act had transferred pending cases in which the United States was a party to the federal court, and pending cases over which a federal court would have no jurisdiction to the state courts, and that the jurisdiction over all cases which were no longer pending, and over the records and judgments therein, was vested in the state courts, without reference to the question whether such cases must have been brought in a state or a federal court, had the territory been a state at the time such actions were commenced. The enabling act, by its express provisions and the implications thereof, divided all actions, so far as the jurisdiction thereof was concerned, into two great classes—those which were pending and those which were not pending at the time of statehood. It declared that as to pending actions jurisdiction over all actions to which the United States was a party should vest absolutely in the new federal courts created in such new states; that as to all suits over which the federal courts would have had no jurisdiction had the ³⁰⁶ territory been a state at the time they were brought, the jurisdiction thereof should pass to the proper state courts; and that with regard to the middle class of cases, i. e., those in which the state and federal courts would have had concurrent jurisdiction had the territory then been a state, either of the parties to the proceedings might determine whether he would continue the litigation in the state or in the federal court. Until the necessary steps should be taken to transfer such cases, the enabling act contemplated that the proper court for them to be carried on in was the state court, and not the federal court. It was only after an application for a transfer had been made that the state court was to lose jurisdiction. Until then the jurisdiction over the case was lodged in the state, and not in the federal court; and, unless the application for such transfer should be made in time, the jurisdiction of the state court over the case would become absolute: Enabling Act, sec. 23; State v. Barnes, 5 N. Dak. 350. Congress declared that, with respect to all pending actions

save those belonging to a single class, the jurisdiction thereover should vest in the state courts temporarily at least, and with regard to some of them permanently; and that, even in those cases in which it was in the power of either party to divest the state court of jurisdiction, the state court should retain jurisdiction if neither party should make a timely application for that purpose. As to actions which were no longer pending, there was no reason for providing that jurisdiction over such cases should be transferred to the federal courts, whether with or without the application of either of the parties. In such cases the merits would no longer remain open to investigation, and therefore there would be no reason for taking jurisdiction of those cases away from the state courts. No prejudicial, hostile state action could be apprehended. What was more natural and reasonable than to vest jurisdiction over such cases in the state courts? Considering the provisions of the enabling act, in connection with the failure of Congress to vest jurisdiction over territorial judgments in the federal courts, and the fact that Congress, in passing that act, must ³⁶⁷ have contemplated that the state constitution would create state courts having jurisdiction similar to that possessed by the territorial courts, and that these would be the courts better fitted to enforce judgments throughout the different counties in the state, we must infer an implied assent by Congress that jurisdiction over cases not pending should vest in state courts exclusively. Otherwise we must assume that those cases were to be left without any court possessing jurisdiction over them for any purpose whatever, for it is clear that no jurisdiction over them is vested by the enabling act in the federal courts. Said the court in *Glaspell v. Northern Pac. R. R. Co.*, 144 U. S. 211: "The record of cases of exclusive federal jurisdiction which have gone to judgment should, indeed, be transmitted to the circuit court, and the judgments there enforced; but, where final judgment has been rendered in cases of concurrent jurisdiction, no reason can be assigned for, nor do the terms of the act of Congress contemplate such a transfer." If it be said that the assent of the people of the state was requisite to vest jurisdiction in the state courts over cases which had ceased to be pending at the time the state was admitted because they had theretofore terminated in judgment, we find this assent in the constitution. Section 6 of the schedule provides: "Whenever the judge of the district court of any district elected under the provisions of this constitution shall have qualified in his office, the several causes then pending in the district court

of the territory within any county in such district, and the records, papers and proceedings of said district court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the district court of the state for such county, except as provided in the enabling act of Congress." This section transferred all records, papers, and proceedings of the territorial district court to the jurisdiction of the state district court, without reference to the question whether the case was or was not pending. By this section the people, speaking through their fundamental law, have, with the assent of Congress, vested jurisdiction over judgments of the territorial district court, in ³⁶⁸ the proper state district court, and the judgments were thereafter as much judgments of the state district court as though they had been rendered by such courts. That is the court which must issue execution upon such judgment, and therefore it is the court which must furnish the judge who is authorized to make all orders in supplementary proceedings based thereon. The opinion of the federal supreme court in *Benner v. Porter*, 9 How. 235, appears to us to support our ruling on this point: "We have said that the assent of Congress was essential to the authorized transfer of the records of the territorial courts, in suits pending at the time of the change of government, to the custody of state tribunals. It is proper to add, to avoid misconstruction, that we do not mean thereby to imply or express any opinion of the question whether or not, without such assent, the state judicatures would acquire jurisdiction. That is altogether a different question. And, besides, the acts of Congress that have been passed, in several instances, on the admission of a state, providing for the transfer of the federal causes to the district court, as in the case of the admission of Florida, already referred to, and saying nothing at the time in respect to those belonging to state authority, may very well imply an assent to the transfer of them by the state to the appropriate tribunal. Even the omission on the part of Congress to interfere at all in the matter may be subject to a like implication."

We see no force in the contention of counsel for defendant that under the constitution a judge no longer has power to perform any judicial act, but that the same must be performed by the court, and that, therefore, a judge cannot make an order in supplementary proceedings. It is entirely competent for the legislature, under our constitution, to authorize a judge to exercise judicial functions when not sitting as a court, and territorial laws of this character, such as section 5174 of the Compiled

Laws, were not affected thereby. In Minnesota, as in this state, the judicial power is vested in the courts named, and not in judges: Minn. Const., art. 6, sec. 1; and yet section 5486 of the General ³⁶⁹ Statutes of 1894 authorizes the district judge to make orders in supplementary proceedings, and his power to do so has never been questioned in that state.

It is insisted that the proceedings are all irregular because the execution issued upon the judgment was not returned within the statutory time. But there is nothing in the statute which makes it indispensable that this should be done to sustain these proceedings. All that is required is that the execution shall be issued and returned unsatisfied. This was done. Moreover, it was rather late, after submitting to examination and after the appointment of a receiver without moving to dismiss on this ground, to raise the point for the first time on a motion to dismiss all the proceedings and set aside all the orders made therein: *Baker v. Herkimer*, 43 Hun, 86; *Ammidon v. Wolcott*, 15 Abb. Pr. 314.

It appears to be urged as one of the reasons why defendant's motion should have been granted that his examination disclosed legal assets upon which execution could be levied. This might furnish a sufficient reason why a district judge should, in his discretion, refuse to appoint a receiver or withhold the appointment of one until such legal assets had been exhausted. But, even in such a case, we could not disturb an order appointing a receiver. The discretion is one with the exercise of which we would not interfere. Receivers in such proceedings are appointed even when no property is found on the examination. The receiver may be able to discover some. There is nothing to show that these alleged legal assets are sufficient to pay the plaintiff's judgment. Moreover, the order appointing the receiver was not appealed from, and the point cannot be raised on an appeal from an order refusing to dismiss the proceedings and all orders thereunder. The proper time to present reasons why a receiver should not be appointed is when the application for his appointment is made. If the objection to such appointment is overruled, the defendant must review the decision by an appeal from the order appointing the receiver. If he suffers the time to appeal from such order to pass, he cannot thereafter raise the point.

³⁷⁰ After the receiver had been appointed, he applied to the court for a discharge, on the ground that he was about to leave the state, and desired to be relieved from the further discharge

of the duties of the receivership. His application was granted, but in the same order the restraining order was continued, and subsequently an order to show cause why another receiver should not be appointed to fill the vacancy was issued by the district judge. What disposition has ever been made of this motion does not appear. The motion appears to be still pending. Defendant then moved that the proceedings be dismissed, and also that the restraining order be vacated. The motion to dismiss was denied. The motion to vacate the restraining order was granted on condition. The order is in the following words: "Ordered, that the said restraining order heretofore existing and now in force in such matter be, and the same is hereby, dissolved upon condition, and when the said William Braithwaite shall deposit the sum of nineteen hundred and twenty-five dollars with the Bismarck Bank, of Bismarck, at five per cent interest per annum, upon certificate of special deposit, and payable to Walter Skelton, clerk of this court, upon the order of the court, after a final determination of this proceeding, or as may be finally determined in this proceeding, in whatever court it may be finally decided, and that said certificate be deposited immediately with the clerk of this court, and to be disposed of as hereinbefore stated; and that the plaintiff give a good and sufficient undertaking, with sureties to be approved by the court, in the sum of five hundred dollars, conditioned that the plaintiff will pay the said William Braithwaite, in case he prevails, his costs and disbursements of this proceeding, and all loss of interest upon the amount of said special deposit, not exceeding the legal rate of seven per cent per annum, less the rate collected on said special deposit; and that the said undertaking and a copy thereof served upon the said Braithwaite's attorneys, and the original filed with the clerk of this court, on or before the end of fifteen days from the date hereof, or said sum so deposited to be immediately returned to ³⁷¹ said William Braithwaite and released from this order." When the motion to dismiss the proceedings was denied the order then entered contained the following directions: "Ordered, that the certificate of deposit heretofore placed in the hands of the clerk of this court for the sum of nineteen hundred and twenty-five dollars be indorsed and delivered by said clerk to the plaintiff herein in accordance with the order heretofore made in this proceeding, and dated the third day of April, 1897, which said order is hereby referred to and made a part hereof; and that the money represented by and so received by the plaintiff upon said certificate be applied upon

the judgment in this action and the costs and disbursements incurred in said supplementary proceedings."

It is urged that the motion to dismiss the proceedings should have been granted, and that, therefore, the order denying defendant's motion to dismiss should be reversed. This claim of defendant is based on the postulate that the judgment at the time the motion was made had ceased to have any vitality. More than ten years had at that time elapsed since its recovery. It is true that at the time the judgment was rendered the law permitted an action thereon to be brought within twenty years from the date of its rendition: Comp. Laws, secs. 4848, 4849. But on January 1, 1896, when the Revised Codes went into effect, the limitation period was reduced to ten years: Rev. Codes, secs. 5199, 5200. The judgment having been recovered April 15, 1886, the plaintiff then still had after January 1, 1896 (three and one-half months), in which to commence an action thereon, and secure a new judgment, which would be good for another period of ten years. It is claimed by counsel for defendant that the plaintiff had a reasonable time in which to sue, under the new limitation law, and that, therefore, it will not impair the obligation of any contract right of the plaintiff to hold that the new statute, which in terms embraces past as well as future judgments, controls its rights. It is well settled that the time in which to commence an action may be lessened as to existing causes of action, provided the suitor has still a reasonable time after the new law is passed in ³⁷² which to commence his suit: *Howell v. Howell*, 15 Wis. 60; *Koshkonong v. Burton*, 104 U. S. 668, and cases cited; *Bigelow v. Bemis*, 2 Allen, 496; *Dale v. Frisbie*, 59 Ind. 530; *Mitchell v. Clark*, 110 U. S. 633; *Terry v. Anderson*, 95 U. S. 628; *Holcombe v. Tracy*, 2 Minn. 241; *Smith v. Packard*, 12 Wis. 371; *Hyman v. Bayne*, 83 Ill. 256; *Parsons v. Wayne*, 37 Mich. 287; *Sampson v. Sampson*, 63 Me. 328; *Dyer v. Gill*, 32 Ark. 410; *Parker v. Kane*, 4 Wis. 1; 65 Am. Dec. 283, and *Vilas & Bryant's* notes; *Von Baumbach v. Bade*, 9 Wis. 559; 76 Am. Dec. 283; *Eaton v. Supervisors*, 40 Wis. 668; *Baker v. Supervisors*, 39 Wis. 444; *Guillotel v. Mayor etc.*, 55 How. Pr. 114.

That three and one-half months is a reasonable time might perhaps admit of doubt. On that point we express no opinion. But it is evident that plaintiff was notified as early as March 2, 1895, when the Revised Codes were approved by the governor, that as soon as the new limitation statute went into effect its time would be cut down to ten years. From March 2, 1895, to

January 1, 1896, the plaintiff received daily notice that after the new codes went into operation it could no longer wait twenty years to sue upon the judgment. That the reasonable time is to be computed from the day when the new law is passed, and not from the time when it takes effect, is well settled: *State v. Jones*, 21 Md. 432; *Smith v. Morrison*, 22 Pick. 430; *Stine v. Bennett*, 13 Minn. 153; *Hedger v. Rennaker*, 3 Met. (Ky.) 258; *Bigelow v. Bemis*, 2 Allen, 496. Counting from the day when the ten year statute was approved by the governor, the plaintiff had over thirteen months in which to bring an action upon his judgment. This was a reasonable time, under all the authorities: *Holcombe v. Tracy*, 2 Minn. 241; *Stine v. Bennett*, 13 Minn. 153; *Smith v. Packard*, 12 Wis. 371; *Bigelow v. Bemis*, 2 Allen, 496; *Korn v. Browne*, 64 Pa. St. 55; *State v. Jones*, 21 Md. 432.

While it is usual for the new limitation law which cuts down the period within which certain actions may be brought to provide in terms that all suitors whose causes of action had accrued before the change was made should have, in any event, a specified ³⁷³ time in which to sue, yet we do not think that this provision is essential to the validity of such a statutory change, when applied to existing causes of action, provided the time actually left in which to sue is not unreasonable. In the following cases no fixed period was given by the new law in which subsisting rights of action might be enforced, but all cases were brought within the provisions of the statute as fully as if it had existed when the existing causes of action arose, and yet in none of these decisions do we find any intimation that for this reason the law was unconstitutional as to causes of action which had already accrued, the plaintiff having in each of these cases a reasonable time to sue as a matter of fact: *Bigelow v. Bemis*, 2 Allen, 496; *State v. Jones*, 21 Md. 432; *Burke v. Western Land Assn.*, 40 Minn. 506. If in the particular case the time is not reasonable, the court must either declare that the statute does not embrace such a case, or that with respect thereto it is unconstitutional because it impairs the obligation of a contract.

The question, then, for decision is, whether, under the Revised Codes, a judgment is, after ten years, so utterly extinguished by the statute that proceedings to enforce the same fall to the ground, though instituted while the judgment was still alive. No action on a judgment can be brought after ten years. Rev. Codes, secs. 5199, 5200. No execution thereon can be issued after ten years: Rev. Codes, sec. 5500. At the expiration of that period it ceases to be a lien on real estate: Rev. Codes,

sec. 5490. It is true that the statute declares that supplementary proceedings may be instituted thereon at any time after execution is returned unsatisfied: Rev. Codes, sec. 5562. But this section was not passed for the purpose of giving the judgment creditor an unlimited period beyond ten years in which to enforce a judgment which could not be enforced by execution, which was no longer a lien on real property, and on which no action would lie. This section fixes the time when the right to institute such proceedings accrues, but it does not attempt to regulate the question of limitation at all. That question is left to other provisions of the code. If, as we ³⁷⁴ think, the other sections of the code clearly show the legislative purpose to destroy the judgment after ten years, then it was unnecessary to prescribe in terms any period after which supplementary proceedings could not be instituted or carried on. Such proceedings are analogous to proceedings under an execution. They are a statutory substitute for the old mode of reaching equitable assets by a creditor's bill: 3 Rumford's Practice, 398, 399. They are not an action on the judgment: See *Newell v. Dart*, 28 Minn. 248. They are prosecuted for the same purpose for which an execution is employed, i. e., as a means of enforcing a valid subsisting judgment. When once it is ascertained that for any reason there is no longer any judgment, the proceedings to enforce it must fall to the ground. It is immaterial whether the judgment has been paid or has ceased to possess life owing to the lapse of time. In either case, there is no longer any judgment left to support the steps taken to enforce it. A strange condition of the law would it be if, after the lien of the judgment on real estate had been lost, and after the plaintiff was powerless to enforce it by execution, and despite the fact that he could no longer give it new life by a suit upon it resulting in the recovery of a new judgment, he could nevertheless, through a receiver in supplementary proceedings, reach and sell the debtor's lands, and subject all his assets, legal and equitable, to the payment of the very same outlawed judgment. We were at first much influenced in our views by certain decisions in the state of New York. Without attempting to analyze them, we cite them, that it may be seen whether the ground on which we distinguish them from the case at bar is sound: *Townsend v. Tolhurst*, 57 Hun, 40; 10 N. Y. Supp. 378; *Bolt v. Hauser*, 19 N. Y. Civ. Proc. 7; 10 N. Y. Supp. 397; *Rose v. Henry*, 37 Hun, 397; *Waltermire v. Westover*, 14 N. Y. 16; *Herder v. Collyer*, 22 Abb. N. C. 461; 6 N. Y. Supp. 513; *Kincaid v. Richardson*,

25 Hun, 237; Bolt v. Hauser, 57 Hun, 567; 11 N. Y. Supp. 366. It is apparent that in New York the statute was leveled at only a particular remedy, and therefore the courts rightly held that all other remedies remained unimpaired. But our statutes, when construed ⁸⁷⁵ together, clearly evince a legislative purpose to wipe out a judgment after ten years, unless suit thereon is brought within that period, and, even in that event, to keep it alive solely as the foundation for such suit, and not for general purposes. See Ross v. Duval, 13 Pet. 45, where Mr. Justice McLean says: "It cannot be supposed that the legislature would bar an action on the judgment, and still authorize an execution on it." The judgment was therefore extinguished at the time defendant made his motion to set aside the supplementary proceedings. The fact that such proceedings had been commenced in time upon a perfectly valid judgment is no answer to the motion to set them aside after the judgment had ceased to be valid: Newell v. Dart, 28 Minn. 248; McAleer v. Clay Co., 42 Fed. Rep. 665. In the case first cited, a creditors' suit had been brought on a valid judgment, but during its pendency the judgment became outlawed. The court held that the action must be dismissed, saying: "Hence, before the final trial and decision of this case, and before judgment rendered therein, plaintiff's judgment had ceased to exist either as a cause of action or a lien, unless kept alive by the commencement and pendency of this action beyond the statutory period of ten years. We do not think the pendency of this action had any such effect. It is not in any proper sense, as before remarked, an action brought upon the judgment as a cause of action, in order to obtain a new judgment, but simply an action ancillary to, and for the purpose of obtaining satisfaction of, an existing judgment. . . . We fail to see any distinction in principle between a case where, for the purpose of enforcing his judgment, a party resorts to execution to reach property liable to such process, and a case where, for the same purpose, he proceeds by creditors' bill or supplementary proceedings to reach assets not subject to execution. In both cases the object is the same—to reach property of the debtor in order to satisfy an existing judgment—and there is no more reason why a creditors' bill or supplementary proceeding (which is a statutory substitute for the former) should continue ⁸⁷⁶ the life of a judgment beyond the statutory period in the one case than that a levy under an execution should do so in the other. We are therefore of opinion that plaintiff's judgment became barred and ceased to exist, either as a cause of action or

as a lien, during the pendency of this action." That it was proper to raise the question by motion is evident, for in no other way could it be raised under the circumstances, the proceedings being originally valid, and having become assailable only after all other modes of attacking them were gone: *Leo v. Joseph* (N. Y. Sup. 1890), 9 N. Y. Sup. 612; *Smith v. Paul*, 20 How. Pr. 97; *World Co. v. Brooks*, 7 Abb. Pr., N. S., 212.

For the reasons stated, the motion of defendant to set aside the supplementary proceedings should have been granted. It follows that the order denying that motion must be reversed. The district court will enter an order granting such motion. The defendant will be entitled to have a provision inserted in such order directing the return to him of the certificate of deposit mentioned in the order vacating the restraining order.

All concur.

LIMITATIONS OF ACTIONS—STATUTES—CONSTITUTIONALITY OF.—The legislature has power to pass a prospective act of limitation, though made to retroact upon executed contracts or conveyances previously made: *Pearce v. Patton*, 7 B. Mon. 162; 45 Am. Dec. 61; also to fix a reasonable time within which an existing judgment may be enforced, as well as to pass any other act of limitations, without violating the provisions of the United States constitution guarding the obligations of contracts: *Griffin v. McKenzie*, 7 Ga. 163; 50 Am. Dec. 389, and extended note.

CREDITOR'S BILL—EFFECT OF DEATH OF DEFENDANT.—The lien acquired by the filing of a creditor's bill is not defeated by the death of the debtor before judgment: *First Nat. Bank v. Shuler*, 153 N. Y. 163; 60 Am. St. Rep. 601. See *King v. Goodwin*, 130 Ill. 102; 17 Am. St. Rep. 277.

HICKS v. BESUCHET.

[7 NORTH DAKOTA, 429.]

PROCESS—EXEMPTION FROM SERVICE OF.—All suitors and witnesses who are nonresidents of a state or county in which a case is being tried are exempt from service of civil process during their attendance in good faith before any judicial tribunal therein, and for a reasonable time in going to and returning therefrom.

Morrill & Engerud, for the appellant.

Young & Burke, for the respondent.

430 WALLIN, J. The facts which will control the decision of this case in this court, as disclosed by the record, may be briefly stated: The action originated in a justice's court of Barnes county, and the summons therein was personally served on the defendant in said county on the nineteenth day of June,

A. D. 1897. On the return day, and before any other action was had in the case, the defendant, by his attorney, made a special appearance, and moved to dismiss the action upon the ground of an irregular ⁴³¹ service of the summons upon the defendant. The motion was based upon an affidavit made by the defendant's attorney and filed with the justice. A counter-affidavit was filed by the attorney for the plaintiff. There is no material conflict in the statement of facts embraced in the two affidavits. It clearly appears that at the time the summons was served on the defendant he was a resident of the county of Ransom. This fact is stated explicitly in both of the affidavits, and is not anywhere attempted to be denied. Defendant's affidavit states that the defendant, at the request of his attorney, left his home in Ransom county, and came to the city of Valley City, in said county of Barnes, on the day the summons was served upon him, and that the defendant came to Valley City on said day for the sole purpose of being present as a suitor and as a witness in his own behalf in certain civil actions then pending in the district court for Barnes county, in which actions certain parties were respectively plaintiffs and this defendant was defendant; and at least one of said actions was tried in the district court at Valley City on that day, and the defendant herein was sworn and examined as a witness therein. After said trial, and on the same day, this defendant was served with the summons herein at Valley City, and thereafter took the first regular train for his home in Ransom county. None of these facts are denied by any affidavit or showing made before the justice. The motion was denied, and, after saving an exception to the ruling, the defendant filed an answer, and thereafter cross-examined the plaintiff's witnesses. Judgment was entered by the justice in favor of the plaintiff in the sum of twenty-four dollars and twenty-five cents. From such judgment the defendant appealed to the district court for Barnes county upon questions of law alone, specifying in his notice of appeal as errors of law the refusal of the justice to grant defendant's motion to dismiss the action; also that the evidence offered before the justice did not establish a *prima facie* case. The latter ground of the appeal seems to have been ignored in the district court, and we regard the same as untenable under the existing practice. The action of the ⁴³² district court in the case is evidenced by an order as follows: "The court is constrained to place upon the affidavits the same decision as that made by the justice. There is not satisfactory evidence that Besuchet did not reside in Barnes county on the day these ac-

tions were brought, or that he was induced to come into the jurisdiction of the court by an artifice, or that he was served while in attendance upon the district court. The affidavit further shows that, if such was true, that he waived his privilege, if any he had, by express consent. The appeals are accordingly dismissed, and judgment is ordered to be entered accordingly, with costs to be taxed according to law." No judgment was entered dismissing the appeal, but, on the contrary, the district court entered judgment affirming the judgment entered on the merits by the justice of the peace, with costs in the district court added. From such judgment defendant has appealed to this court.

The point that the judgment entered in the district court does not conform to the order for judgment is not raised by counsel, and we shall therefore pass it over, especially as it appears from the order itself that the district court considered only the merits of the question arising upon the motion to dismiss the action as made before the justice.

Reverting to the order of the district court above set out, the same seems to have been inadvertently made. It is true that the defendant was not induced to come into the county of Barnes by any artifice. There is no such claim made by the defendant. As has been seen, it conclusively appears that the defendant, at the request of his counsel, came to Valley City from his home in Ransom county on the day he was served with the summons for the purpose of attending upon a trial or trials of certain actions in which he was a party, pending in the district court therein, one of which was actually tried on that day in Valley City, and defendant testified therein as a witness; after which, on the same day, he was served with the summons in this action, said service being made before the first regular train started from ⁴³³ Valley City upon which defendant could return to Ransom county. Nor can we understand upon what ground the statement is made in the order that defendant had waived his privilege, i. e., his immunity from service of process while in Valley City. The only foundation for such finding is contained in the affidavit of plaintiff's counsel, which was filed with the justice in opposition to the motion to dismiss the action. Upon this feature of the case the affidavit is as follows: "E. T. Burke, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein, and has read the affidavit of Edward Engerud relating to the appearance of F. O. Besuchet at the trial of three certain actions in the district court in Barnes county, North Dakota, at

the time of the service of the summons in this action. Affiant further states that Edward Engerud came into the office of Young & Burke in the afternoon of the nineteenth day of June, 1897, and was talking with affiant regarding the settlement of the claims in suit in district court, in which this affiant is one of the attorneys for plaintiff. At that time said Edward Engerud stated that he would find F. O. Besuchet, and bring him into the office; and that, if we could not reach a settlement, that we might serve 'any papers' on him which we pleased. On the same day, and a few minutes afterward, the said Besuchet was in the office of affiant, and then and there admitted service of a summons and complaint in district court in the case of Straw & Ellsworth Mfg. Co. v. F. O. Besuchet. Affiant further states that he is well acquainted with the residence of F. O. Besuchet, and that said Besuchet, during the year 1896, resided at Leal, Barnes county, North Dakota, until November 3, 1896, on or about which date he removed to Lisbon, Ransom county, North Dakota, where he has since resided and now resides." As we read this affidavit, counsel for the respective parties to certain district court actions, three in number, were negotiating for a compromise and settlement of "the claims in suit in the district court." It does not appear that any other claims or actions were mentioned at that interview. It is certain that the case at ⁴³⁴ bar was not then commenced, nor does it appear that the grounds of this action were mentioned in the negotiations of counsel, nor that the defendant had at that time employed counsel to defend him in the case at bar or in any action then begun or contemplated in any justice's court. Besides this, it appears that the papers which were then and there served were in a certain action in the district court, the service of the summons in this case not being then made, nor made until later in the day. In this affidavit we discover no agreement on the part of anyone to waive any legal right or privilege which defendant had with respect to this action. It is not pretended that the defendant personally waived any rights in this action, and it does not appear that any person was authorized to represent him. At most, the alleged waiver was a mere oral stipulation, which, if made by counsel regularly retained in the case, would not bind the defendant where the same is repudiated, as is done here: Rev. Codes, sec. 429, subsec. 2. It seems clear, therefore, that said order of the district court was made under a misapprehension of the facts. Upon the merits of the motion made before the justice of the

peace to dismiss the action, the defendant was clearly right.

The action should have been dismissed then and there upon the grounds set out in both affidavits. The later authorities are explicit that the immunity from the service of process upon the state is enjoyed equally with a nonresident of the state who in good faith comes within the state to attend upon the trial of an action, whether such nonresident is a litigant or a witness. In this case the defendant, at the time he was served with process, was in the county of Barnes in both capacities: *Letherby v. Shaver*, 73 Mich. 500; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48; *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *First Nat. Bank v. Ames*, 39 Minn. 179; *Andrews v. Lembeck*, 46 Ohio St. 38; 15 Am. St. Rep. 547. In *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844, the court say: "At common law, parties and witnesses attending in good faith any legal tribunal were privileged from arrest on civil process during their attendance, ⁴³⁵ and for a reasonable time in going and returning." In *Wilson v. Donaldson*, 117 Ind. 356, 10 Am. St. Rep. 48, the grounds of these decisions are succinctly stated by Chief Justice Elliott as follows: "It is his privilege, under our laws, to testify in his own behalf; and this privilege should not be burdened with the hazard of defending other actions in our forums. Our own citizens will often derive a substantial benefit from the personal appearance of a nonresident defendant, since it may enable them to obtain a personal judgment which else were impossible. If citizens of other states are allowed to come into our jurisdiction to attend courts as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principle of state comity, too, demands that a citizen of another state, who submits to the jurisdiction of our courts, and here wages his forensic contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions." It follows, under the rule of law applied by these authorities, that the justice of the peace erred in denying defendant's motion to dismiss the action, and the district court erred in entering judgment for the plaintiff on the merits. Such judgment will be vacated, and judg-

ment entered below dismissing the action, with costs to the defendant.

All the judges concurring.

PROCESS—EXEMPTION FROM SERVICE—NONRESIDENTS.—Nonresidents who come into the state for the purpose of attending its courts either as suitors or witnesses, are exempt from the service of civil process from the time of their coming until they have had a reasonable time for returning: *Cooper v. Wyman*, 122 N. O. 784; 65 Am. St. Rep. 781, and note.

CLEVELAND v. McCANNA.

[7 NORTH DAKOTA, 455.]

OFFICERS DE FACTO—COLLATERAL ATTACK.—The validity of the official acts of a de facto officer cannot be collaterally attacked.

EXEMPTIONS.—MUTUAL JUDGMENTS CANNOT BE SET OFF against each other in such manner as to defeat the exemption laws.

EXEMPTIONS—JUDGMENTS.—A judgment obtained for the wrongful conversion of exempt property is also exempt.

EXEMPTIONS — JUDGMENTS — SETOFF. — A judgment which represents the proceeds of exempt property cannot be set off on a judgment against the judgments creditor.

EXEMPTIONS—JUDGMENTS—SETOFF.—One holding a judgment against his debtor cannot have it set off against a judgment in favor of his debtor, when such debtor proves that all of his personal property, including such judgment, is less than the amount allowed him by law as exempt.

B. Corbet, for the appellant.

Bangs & Fisk, Cochrane & Feetham, and O. A. Wilcox, for the respondent.

456 BARTHOLOMEW, J. In March, 1894, the respondent, McCanna, obtained a judgment against the appellant, Cleveland, before the city justice of the city of Larmore, in Grand Forks county, for the sum of \$200 and costs, amounting in all to \$235. An abstract of said judgment was duly filed in the office of the clerk of the district court of said county, and the judgment was properly entered and docketed in that court, and is still in force and entirely unpaid. On April 24th following, appellant commenced the action against respondent in which this proceeding is entitled, and sought to recover \$3,000, actual and exemplary damages, for the alleged wrongful and unlawful seizure and conversion by respondent of certain enumerated personal property belonging to appellant, which it was claimed constituted ap-

pellant's absolute and alternative exemptions. On the trial of this action, the jury found the value of such personal property to be \$367.25, and a general verdict was returned for appellant for \$717; and subsequently judgment was entered thereon, which, with costs and interest, amounted to \$849.90. This judgment was subsequently reduced by the court to \$620.74, for which sum it is still in force and unpaid. An execution was issued thereon in January, 1897. Thereupon the respondent applied for and obtained an order on appellant to show cause why the judgment in respondent's favor, ⁴⁵⁷ and against appellant, should not be set off pro tanto, against the judgment in favor of appellant, and against respondent. The application for the order was supported by an affidavit setting forth the rendition of the judgments as herein stated. On the return day, the respondent, in support of his motion, introduced the pleadings in both cases and the affidavit on which the order was issued. Appellant introduced testimony showing that the property for the conversion of which he recovered judgment was property that was exempt from seizure or sale under legal process, and also a verified schedule of his property showing that the value of the whole thereof, including the judgment against respondent, was less than the amount exempted by law, and claimed to hold such judgment as exempt from application on his own debts. The court, after a full hearing, granted the motion to set off, and made the proper order therefor. The appeal is from such order.

It is first urged that the judgment rendered by the city justice of the city of Larimore against appellant was and is a nullity, for the reason that no such officer as a city justice of the peace is known or authorized under our constitution and laws. The office of the justice of the peace is recognized, and as such the officer was claiming to act. This contention cannot prevail. It is conceded that such justice was a de facto officer, performing all the functions of a justice of the peace. This attack is purely collateral. It is well settled that the validity of the acts of a de facto officer cannot be attacked in a collateral proceeding.

But the second point raised is of more importance. Our statute declares (Rev. Codes, sec. 5499): "Mutual final judgments may be set off pro tanto the one against the other by the court upon proper application and notice." Such was the rule in equity, independent of any statute: 22 Am. & Eng. Ency. of Law, 446, and cases in note 3. The power is no broader under the statute. But this power will never be exercised where the setoff would deprive a party of his legal rights: 22 Am. & Eng.

Ency. of Law, 448, note 3. It is claimed that the allowance of the setoff in this case would ⁴⁵⁸ deprive appellant of his legal right to his exemptions. There is a special reason alleged in this case why appellant's judgment against respondent should be protected from such setoff. It is urged that this judgment was obtained for the wrongful conversion of exempt property, and for that reason it stands in lieu of the property, and is equally exempt; and the cases so hold: Crawford v. Carroll, 93 Tenn. 661; 42 Am. St. Rep. 943; Kaiser v. Seaton, 62 Iowa, 463; Cullen v. Harris, 111 Mich. 20; 66 Am. St. Rep. 380. But we think that holding more applicable in states where certain specific articles are exempt by statute, as is the case in the states from whence these authorities are cited. In this state, we think, the ruling should be placed upon a broader ground. Our constitution provides, section 208: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law." In pursuance of this constitutional requirement, our legislature has declared by sections 5516, et seq., of the Revised Codes, that to each head of a family there shall be exempt from seizure certain articles which the statute terms "absolute exemptions," and which include all wearing apparel of the debtor and his family, and provisions and fuel for one year. The statute then provides that, in addition to these absolute exemptions, the debtor may select from any personal property that he possesses other property not to exceed fifteen hundred dollars in value. To effect this, the debtor must present to the officer holding the process a verified schedule of all his personalty. The law then provides for an appraisement. If the appraised value exceeds fifteen hundred dollars, the debtor may select from the list any property he desires, but not exceeding in value fifteen hundred dollars, according to the appraisal. If the appraisal be fifteen hundred dollars or less, of course the debtor takes it all. It follows logically that, if we are to give full effect to the exemption law, a debtor has an absolute right to select as a part of his exemptions a judgment that he ⁴⁵⁹ may own, and it is entirely immaterial upon what the judgment may be based. It is property in his hands, and it rests exclusively with himself to say what property, within the limit, he will elect to hold as exempt. Likewise, he might, before his claim was reduced to judgment, have elected to hold that claim as a part of

his exemptions. Hence the judgment simply represents exempt property in another form, and all the authorities hold that a judgment that represents the proceeds of exempt property cannot be set off on a judgment against such judgment creditor. The case of *Butner v. Bowser*, 104 Ind. 255, was decided under a statute the same in character as ours, and is exactly in point and the general principle is sustained by the authorities cited *supra*, and by *Freeman on Executions*, section 235, and cases there cited. And see *Ellis v. Pratt City*, 111 Ala. 629; 56 Am. St. Rep. 76; *Duff v. Wells*, 7 Heisk. 17; *Reynolds v. Haines*, 83 Iowa, 342; 32 Am. St. Rep. 311; *Millington v. Laurer*, 89 Iowa, 322; 48 Am. St. Rep. 385; *Howard v. Tandy*, 79 Tex. 450; *Below v. Robbins*, 76 Wis. 600; 20 Am. St. Rep. 89. The only cases that we have found holding a contrary doctrine are *Mallory v. Norton*, 21 Barb. 424, *Temple v. Scott*, 3 Minn. 419, and *Knabb v. Drake*, 23 Pa. St. 489; 62 Am. Dec. 352. The case in 21 Barbour is entirely destroyed by *Tillotson v. Wolcott*, 48 N. Y. 188. The cases from Minnesota and Pennsylvania are based upon the alleged principle that exemption laws, being in derogation of the common law, must be strictly construed—a principle now almost universally discarded.

It is true that the procedure under our exemption statute refers more particularly to seizures under attachments and executions, but that is because it is by means of those writs that property is usually seized. But it would be an exceedingly narrow view of the law that would deny exemptions where it was sought to take property by other means. This court is unqualifiedly committed to a liberal construction of exemption statutes: *Red River Valley Bank v. Freeman*, 1 N. Dak. 196. In that case we expressly held that the fact that the machinery of the law did ⁴⁶⁰ not contemplate the exact case there under consideration could not defeat a claim for exemptions. We must make the same ruling here. In response to the order to show cause, the appellant presented a verified schedule of all his personal property, and claimed his judgment against respondent as exempt. His entire personalty outside of that judgment amounted, according to the schedule, to twenty-seven dollars. If there was a doubt as to the correctness of that schedule, the court had full power to investigate the matter. But its correctness was not questioned, and the claim for exemptions should have been allowed. The order appealed from is reversed.

All concur.

OFFICERS—DE FACTO—ACTS OF—COLLATERAL ATTACK.—The acts of a de facto officer in possession of an office within the scope of his authority are valid and binding upon the public and third persons, and cannot be collaterally attacked: *Hamlin v. Kas-safer*, 15 Or. 456; 8 Am. St. Rep. 176; *Jewell v. Gilbert*, 64 N. H. 13; 10 Am. St. Rep. 357.

EXEMPTIONS—JUDGMENTS.—A judgment recovered for the negligent killing of animals exempt from execution is also exempt: *Crawford v. Carroll*, 98 Tenn. 661; 42 Am. St. Rep. 943; likewise, a judgment recovered for the value of an exempt granary which has been severed from the homestead through the wrongful act of a trespasser: *Wylie v. Grundysen*, 51 Minn. 360; 38 Am. St. Rep. 509, and note.

SETOFF—EXEMPT JUDGMENTS.—Where a judgment debtor has no property save a judgment for less than the amount exempted by statute from execution, the defendant in that judgment may not satisfy it by setoff of another judgment: *Puett v. Beard*, 86 Ind. 172; 44 Am. Rep. 280. See extended note to *Duncan v. Bloomstock*, 13 Am. Dec. 729-731, on the setoff of mutual judgments.

DONOVAN v. ST. ANTHONY AND DAKOTA ELEVATOR COMPANY.

[7 NORTH DAKOTA, 512.]

CHATTEL MORTGAGE—UNPLANTED CROP.—Under a statute providing that an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence, and that the lien attaches from the time when the party agreeing to give it acquires an interest in the thing, a valid mortgage may be made upon an unplanted crop, and a mortgage lien will attach to the crop as soon as it comes into existence through the agency of the mortgagor.

CHATTEL MORTGAGES—TROVER—RIGHT OF MORTGAGEE TO MAINTAIN.—A mortgagee of chattels, with a present right of possession, may maintain trover against a wrongdoer for the conversion of the mortgaged property.

Cochrane & Feetham, for the appellant.

C. J. Monnet, for the respondent.

517 WALLIN, J. In this action a general demurrer was interposed to the complaint, and the same was overruled by an order of the trial court. Defendant appeals from the order.

In the disposition of the case in this court the parts of the complaint necessary to be discussed are as follows: "That on or about the 16th of October, A. D. 1894, James Doyle and others made, executed, and delivered to the plaintiff a certain promissory note for \$896, due October 16, 1895, with interest at twelve per cent, and made, executed, and delivered to secure the same a chattel mortgage, also to the said plaintiff, upon all grain and crops, of every name, nature, and description, to be grown or

harvested during the seasons of 1895, 1896, and each and every succeeding year thereafter, until said debt should be fully paid, upon the southwest quarter of section 14, and the northeast quarter of section twenty-three, all in township one hundred and sixty, range sixty (S. W. $\frac{1}{4}$ of sec. 14, and N. E. $\frac{1}{4}$ of sec. 23, all in tp. 160, range 60), in Cavalier county, North Dakota; that on or about October 16 and 17, 1896, default had been made in the terms and conditions of said mortgage, by failure to pay the debt, or any part thereof, which the same secured at its maturity, by reason whereof the said plaintiff, E. I. Donovan, was entitled, under the conditions of said mortgage, to the immediate, exclusive, and absolute possession of all wheat grown during the season of 1896 by said James Doyle upon the said S. W. $\frac{1}{4}$ of sec. 14, and said N. E. $\frac{1}{4}$ of 23, all in tp. 160, range 60, in ⁵¹⁸ Cavalier county, North Dakota; that on or about the 16th and 17th of October, 1896, and while the plaintiff was entitled to the possession of said grain, the full amount of said note for \$896 being due and owing to the plaintiff, the defendant unlawfully appropriated and converted to its own use about 600 bushels of the said wheat grown by the said Doyle upon said premises during the year 1896, which wheat was of the actual value of 75 cents per bushel at that time; that the plaintiff has demanded and caused to be demanded from the said defendant the possession of the said grain, but that said demand has been wholly refused." These allegations of the complaint were followed by the usual claim for damages, and prayer for judgment. It is superfluous to state that the complaint is not a model of good pleading. Its mode of setting out facts is inartificial, and often much involved; but it is the undoubted duty of all the courts of this state, under the provisions of the statute (Revised Codes, sec. 5283) to construe all pleadings "liberally," with a view of substantial justice between the parties. So construed, we think the complaint states facts sufficient to constitute a cause of action.

Counsel for the appellant claims that the complaint contains no allegation that the mortgagor ever owned the property covered by the mortgage. This criticism, we think, is found upon a misapprehension of the meaning and effect of the language employed in the complaint. The property in question, and embraced in the mortgage, is a certain crop grown by James Doyle, one of the mortgagors, in the year 1896, upon the land described in the mortgage. With respect to such crop the complaint avers that "the defendant unlawfully appropriated and converted to its own use about 600 bushels of said wheat grown by the said

Doyle upon said premises during the year 1896." The statement of fact that the grain was "grown by said Doyle" is certainly broad enough to allow proof of the several acts done and performed by Doyle in growing the grain, such as planting, cutting, et cetera. We think that these words fairly import that the grain was produced by agencies set in motion by the mortgagor, and also ⁵¹⁹ fairly imply that the mortgagor had possession of the land upon which the agencies operated in growing the crop in question. We are further of the opinion that these words, as ordinarily used, mean that the person who grew the crop was the owner thereof, and not a mere servant having no property interest in the crop. However, if the pleading is ambiguous, and this word "grown" is interchangeable, and may properly be applied either to an owner or a mere employé, this would be a defect in pleading which could be reached only by motion. A demurrer will not raise the point: Bliss on Code Pleadings, sec. 314.

The complaint is further criticised because—quoting from the brief of counsel—it "fails to aver that at the time the mortgage was executed the chattels mortgaged were the property of the mortgagor." If this objection to the complaint is valid, it follows that no mortgage of a crop not yet sown will operate to create a lien on a future crop, when the same comes into existence by the agency of the mortgagor. It is clear that a crop not planted when a mortgage thereon is executed is property not in existence at that time, and hence cannot then be the property of the mortgagor. It seems hardly necessary to say that in this state a wide departure has been made, by virtue of statutory provisions, from the common-law rule that a mortgage cannot be made upon property which is not owned by the mortgagor, and which is not in esse, when the mortgage is executed. The exact opposite is the rule in North Dakota. Revised Codes, section 4680, reads as follows: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." This statute incorporates a rule in equity, and is plain and unambiguous in its terms, and clearly gives its sanction to mortgages made upon property which never comes into existence until a date subsequent to the execution of the mortgage. The supreme court of the territory of Dakota so construed the statute and upheld such ⁵²⁰ a mortgage: Grand Forks Nat. Bank v. Minneapolis etc. Elev. Co., 6 Dak. 357. And see McCaffrey

v. Woodin, 65 N. Y. 459; 22 Am. Rep. 644. This precise question has been considered by this court in at least two cases, and the views of the territorial court have been expressly indorsed by this court: Merchants' Nat. Bank v. Mann, 2 N. Dak. 456; Hostetter v. Brooks Elevator Co., 4 N. Dak. 357. The point must therefore be regarded as settled in this state adversely to the views of the appellant's counsel. At present, this court is not disposed to reopen a discussion of the general law of the land relating to chattel mortgages. Nor do we deem the authorities cited by counsel from jurisdictions where no such statute as that cited was ever enacted are in point upon this branch of the case.

A further contention is that the complaint fails to state, except by mere recital, which is bad pleading, that by the terms of the mortgage the plaintiff was authorized to take possession of the mortgaged property upon default made in paying the debt. The complaint is somewhat obscure in this respect, in view of the inartificial forms of expression adopted by the pleader. No copy of the instrument is annexed to the complaint, and the plaintiff has elected, as he had a right to do under established rules of pleading, to plead its legal effect: See Brown v. Champ-
lin, 66 N. Y. 214. In attempting to set out the feature of the mortgage we are here considering according to its legal effect, the pleader, after setting out the fact of the mortgagor's default in paying the note secured by the mortgage, proceeds as follows: "By reason whereof the said plaintiff, E. I. Donovan, was entitled, under the conditions of said mortgage, to the immediate, exclusive, and absolute possession of all wheat grown during the season of 1896 upon the said," et cetera (describing the land). This averment, when liberally construed, is, in our opinion, neither a mere conclusion of law, nor the mere conclusion of the pleader, as to the effect of the stipulation written in the mortgage. We regard the language, while it is inapt, as an affirmation of the fact, i. e., as a statement of the true legal effect of the language used in the mortgage. ⁵²¹ We think the words, "was entitled, under the conditions of said mortgage," are equivalent in meaning to the words, "was entitled under the express stipulations contained in the mortgage," et cetera. Assuming that we are correct in this construction of the language, we shall hold that the complaint, in substance, charges that the mortgage, by its terms, authorized the plaintiff to take possession of the crop of 1896 raised by Doyle, in the event of a default of the payment of the debt secured by the mortgage, and that such default had occurred prior to the date of the alleged conversion of

the grain by the defendant. It follows from these averments, as a legal result, that the plaintiff is in a position to sue for and recover such damages as he may have suffered by the unlawful appropriation of the wheat by the defendant as stated in the complaint. Such conversion of the mortgaged property as is charged would constitute an invasion of plaintiff's existing right of immediate possession of the grain for purposes of foreclosure. A right to the possession in the plaintiff is sufficient, and actual possession need not be shown: *Sandager v. Northern Pac. Elevator Co.*, 2 N. Dak. 3; *Sanford v. Duluth etc. Elevator Co.*, 2 N. Dak. 6; *Parker v. First Nat. Bank*, 3 N. Dak. 87.

Counsel contends further that the complaint is vulnerable for the reason that it omits to allege that the mortgage was ever filed for record, or that the defendant had notice or knowledge of its existence at any time. In view of the averment that the defendant, as a matter of fact, unlawfully converted the grain and appropriated it to its own use, we think the omission is not fatal. These allegations charge a tortious act—a distinctly wrongful and illegal act. The demurrer admits this charge to be true, and, if it is true, the plaintiff should recover in the action. Whether or not the charge is true is a question of fact, which can be investigated upon issue joined; and for this purpose defendant, on application therefor, should be permitted to serve an answer traversing the averments of the complaint. Upon such issue, if it is made, the trial court must determine which side has the burden of proof. No such question is now before this court.

522 The order overruling the demurrer will be affirmed.

Corliss, J., concurs.

Bartholomew, J., dissents, on the ground that in his judgment the complaint does not state facts sufficient to constitute a cause of action.

CHATTEL MORTGAGE—UNPLANTED CROP.—A mortgage of unplanted crops is valid and creates an equitable lien which attaches as soon as the crops come into existence, and may then be enforced: *Note to Patapsco Guano Co. v. Ballard*, 54 Am. St. Rep. 139.

TROVER—NECESSARY TITLE OR POSSESSION IN PLAINTIFF.—Plaintiff, to recover in an action of trover, must prove a general or special property in himself and a right of possession at the time of the conversion by the defendant, a conversion by the defendant, and the value of the property: *Danley v. Rector*, 10 Ark. 211; 50 Am. Dec. 242, and note; *Ames v. Palmer*, 42 Me. 197; 66 Am. Dec. 271; *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 206, and note. See extended note to *Hostler v. Skull*, 1 Am. Dec. 585-589. When the property covered by a mortgage of an unplanted crop comes into existence and is delivered to the mortgagee, his legal title to it becomes complete, and he may maintain trespass, trover, or detinue against any one who disturbs his possession: *Patapsco Guano Co. v. Ballard*, 107 Ala. 710; 54 Am. St. Rep. 131.

GJERSTADENGEN v. VAN DUZEN.

[7 NORTH DAKOTA, 612.]

HOMESTEADS IN PUBLIC LANDS—DEATH OF HOMESTEADER BEFORE PATENT.—If a homestead claimant to public land dies before patent therefor issues, or before a right to demand a patent has accrued, the land does not become a part of his estate. Upon his death all his rights under the homestead entry cease, and his heirs become entitled, under section 2201 of the Revised Statutes of the United States, to a patent, not because they have succeeded to his equitable interest, but because the law gives them preference, as new homesteaders, and allows them the benefit of the residence of their ancestor on the land.

PROBATE COURTS—JURISDICTION—TRIAL OF TITLE—SALE OF LAND OF STRANGER.—An order of a probate court for the sale of land of a third person to pay the debts of the decedent is void for want of jurisdiction over the property even if the real owners are parties and contesting the question of title.

PROBATE COURTS—JURISDICTION.—A probate court has no jurisdiction to hear and determine questions relating to the title to land. It has power to act only when the land is in fact the property of the decedent.

PROBATE COURTS—JURISDICTION—HOMESTEADS IN PUBLIC LANDS.—A federal statute exempting homesteads in public lands from liability for debts contracted before the issue of patent does not take such homestead, after it has once become the property of the homesteader, out of the jurisdiction of the probate court, in proceedings to obtain a sale of the decedent's land to pay his debts. Whether it shall be sold to pay certain debts is a judicial question to be decided by the court, and all parties interested must then and there interpose any defense to a sale which they may have, whether it relates to the existence or validity of the alleged debts, or as to whether the land can be sold because of its exemption under the statute.

ESTOPPEL.—PURCHASER AT ADMINISTRATOR'S sale of land, the patent to which has been issued to the decedent's heirs, cannot, in an action to set aside the deed acquired under such sale, set up the doctrine of equitable estoppel against the administrator who petitioned for and made the sale, although one of such heirs, when all the facts relating to the decedent's title were matters of record and known to such purchaser, and there was no concealment or misrepresentation of law or fact.

PROBATE SALES—PURCHASER—NOTICE.—The purchaser of land at probate or administrator's sale must see to it, at his peril, that the proceedings are legal, and that the land does in fact form part of the decedent's estate.

ESTOPPEL.—MISTAKE OF LAW.—Mutual mistake as to the law, the facts being known to all of the parties without concealment or misrepresentation, furnishes no ground upon which one of the parties can invoke the doctrine of estoppel against the other.

C. E. Pierson and Pierce & Austin, for the appellants.

T. A. Curtis and Morrill & Engerud, for the respondents.

•14 CORLISS, C. J. The object of this suit is to annul certain proceedings in the probate court in and for Ransom county,

which were instituted for the purpose of selling certain land, as the property of Olia Mikkleson, deceased, for the payment of her debts, and also to set aside the administrator's deed executed and delivered under the order of the court in such proceedings. The plaintiffs secured a favorable decision below. That decision meets our full approval. The proceedings were absolutely void, for want of jurisdiction. The land sold did not belong to the estate of Olia Mikkleson, deceased. She filed upon it as a homestead in her lifetime, but she died before the patent was issued, and even before her right to demand a patent had accrued. The law gave her no such interest in the land as could be transmitted by her to her heirs. Upon her death, all her rights in the land under her homestead entry ceased, and her heirs became entitled, under the statute, to a patent, not because they had succeeded to her equitable interest, but because the law gave them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor upon the land. It is apparent from the statute (U. S. Rev. Stats., sec. 2291) that Congress did not intend to vest in the homesteader an interest which could be inherited ⁶¹⁵ under the laws of the state where the real estate might be situated, the same as other real estate, but to withhold from him such interest, and specifically designate the persons who, on his death, should be entitled to secure the right which the original entryman would have obtained, had he survived. What authority there is on the point supports our view: See *Bernier v. Bernier*, 147 U. S. 242; *Chapman v. Price*, 32 Kan. 446; *Bernier v. Bernier*, 72 Mich. 43, 47. In *Bernier v. Bernier*, 147 U. S. 242, the court say: "The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim and obtaining the patent therefor, and not to establish a line of descent, or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claim may be perfected, and a patent obtained, and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death." As the land did not belong to the estate of the deceased, it is obvious that the court was without jurisdiction to order the sale thereof. When the land directed to be sold is the property of a stranger, the probate court possesses no jurisdiction over such property; nor has it any power to try the question of title in such a proceeding, or at all. Should the owner of the land appear in the proceeding, and set up his title, and be defeated, it would nevertheless be true that the court would be without jurisdiction. For

the statutes do not contemplate that a probate court shall hear and determine questions relating to the title to land. It has power to act only when the real estate is in fact the property of the decedent. All that it ever pretends to do in a proceeding of the character of that which is here assailed is to order the sale of whatever interest the decedent may have had in the land at the time of his death. It never assumes to decide whether he was in fact the owner thereof. Nor can it decide such question, even when voluntarily litigated before it. Such a matter is as much beyond the jurisdiction as a suit in equity is beyond the jurisdiction of a justice of the peace; and it is familiar law that consent will not vest in any tribunal power which has been withheld from it. These principles are elementary, and we have recently had occasion to discuss them in a somewhat similar case: See *Arnegaard v. Arnegaard*, 7 N. Dak. 475. We fully agree with counsel for defendants that the federal statute exempting federal homesteads from liability for debts contracted before the issue of patent (U. S. Rev. Stats., sec. 2296) does not take such homestead, after it has once become the property of the homesteader, out of the jurisdiction of the probate court, in proceedings to obtain a sale of a decedent's real estate to pay his debts. When it is established that the land did in fact belong to the decedent, then it is immaterial that it was exempt from sale for the debts for which it was ordered to be sold. The probate court in the supposed case has full jurisdiction over the property, because it forms part of the decedent's estate. Whether it shall be sold for certain debts is a judicial question, to be decided by the court, the same as any other question that arises in the course of the proceedings over which it clearly has jurisdiction. All persons who claim under the decedent, whether as heirs or as devisees, are parties to the proceedings; and they must therein assert the exemption of the land from liability to sale, if they intend to invoke the protection of the law at all. The question before the court is whether that particular land of the decedent shall be sold for debts, and all parties interested must then and there interpose any defense to a sale thereof which they may have, whether it relate to the existence of the alleged debts at all, or, conceding the claims to be valid, asserts that for such debts the land cannot be sold, because of the exemption thereof under the federal statute. It is now too late for the parties, so far as they claim the land as heirs, to insist that the property ought not to have been sold. But inasmuch as they do not in fact claim as heirs, but as independent owners, they may assail the proceed-

ings as utterly void, ^{¶17} for want of jurisdiction in the probate court over the real estate with which that court assumed to deal.

Finally, it is urged that, with respect to the interest of Ole Peterson in the land, an equitable estoppel has been made out. He was one of three heirs to whom the patent was issued. He was also the administrator of the estate of Olia Mikkleson, and petitioned, as such, for the sale of the land in question, and executed the administrator's deed thereof, under which the defendants claim title. After executing such deed, he died, leaving children, who constitute a part of the plaintiffs in this case. It is contended that, so far as their rights in the land are concerned, their ancestor has, by his conduct, estopped them from asserting such rights against the defendants. It is undoubtedly true that if, in his lifetime, Ole Peterson created, as against himself, in respect to his interest in the land, an estoppel in favor of these defendants, his children are affected thereby. But we are unable to discover in this record anything on which the defendants' contention in this behalf can rest. Ole Peterson was not guilty of a conscious misrepresentation of fact to the purchaser at the sale. There was no concealment of fact, and no misunderstanding with respect to the facts. The facts were all matters of public record. It appeared therefrom that Olia Mikkleson had made a homestead entry on this land, but that she had not received a patent, or earned the right thereto, at the time of her death. Whether, under these circumstances, she had such an interest in the land as would make it a part of her estate on her death, was a pure question of law. Ole Peterson did not make to the purchaser any representations as to the law governing the question of title. He merely proceeded under a misapprehension as to the law, which the purchaser appears to have shared,—that the land did constitute a part of the estate of the decedent, but he did not covenant that this was so. Nor does the law imply against him such a covenant. The exact reverse is the case. The law declares to the purchaser that he must see to it, at his peril, that the proceedings are legal, and that the land does ^{¶18} in fact form part of the decedent's estate. Had Peterson, knowing that he was in fact the owner of the land (if, for instance, he had held an unrecorded deed thereof), stood by and saw it sold without protest, and certainly if he had actively participated in such sale, then we would have had before us a proper case for the application of the law of estoppel. But no such case is before us. The case merely presents a mutual mistake as to the law, the facts being known to all the parties. If it be said

that the purchaser is protected because he did not know the law, then it may also be said that Peterson has done nothing to estop himself, for he has an equal right to plead ignorance of the law. And if, on the other hand, it be urged that Peterson is chargeable with knowledge of the law, and is therefore estopped from asserting his title, it may with equal force be answered that the purchaser is likewise chargeable with knowledge of the law, and therefore he knew that he was getting no title under his purchase, and hence cannot invoke against Peterson the doctrine of estoppel; for he who has not been misled cannot demand that the lips of another shall be sealed against the assertion of a right.

The judgment of the district court is clearly right, and it is therefore affirmed.

All concur.

ON APPLICATION FOR A REHEARING.

In their application for a rehearing, counsel for the defendants do not assail the opinion of the court, but insist that the heirs of Ole Peterson are estopped for reasons not discussed therein. It is insisted that Ole Peterson himself could not, in his lifetime, have been heard to question the title of the defendant, because he received, as creditor of the estate of Olia Mikkleson, all of the proceeds of the sale of the land in controversy, and that inasmuch as he would, if living, be estopped, his heirs are likewise estopped. If defendant's contention had any foundation in the facts of this case, we would strongly incline to the view that the estoppel had been made out. Certainly Ole Peterson could not receive and retain the proceeds of the sale of the land, knowing that they were paid by the purchaser in the belief that he was ⁶¹⁹ securing a perfect title to the land, and yet be heard, in a court of equity, to assail such title. Nor would the capacity in which he might receive such proceeds be material. But unfortunately for the defendants, the record is silent on the vital question of fact, on which rests the whole of this new argument. The record does not disclose the fact that Ole Peterson ever received a dollar of the purchase price of the land, or even that he was a creditor of the estate of Olia Mikkleson. The findings of fact contain no reference to the matter, and counsel for defendants have seen fit not to settle any statement of the case, and thus bring before us the evidence. In such a condition of the record we cannot regard any assertions made by counsel touching facts which are not embodied in the findings of fact, or admitted by the pleadings. From neither source are we able to learn that Ole

Peterson has ever derived any benefit from the sale which has been adjudged void.

The petition for a rehearing is therefore denied.

All concur.

HOMESTEAD IN PUBLIC LANDS—NONLIABILITY FOR DEBTS.—A homestead in public lands, claimed and perfected under the United States statute, is exempt from liability for debts contracted prior to the issuing of the patent therefor: *Faulk v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836.

COURTS OF PROBATE—JURISDICTION.—The probate court is without jurisdiction to try the title to property as between the representatives of an estate and the husband of the deceased party claiming adversely thereto: *Stewart v. Lohr*, 1 Wash. 341; 22 Am. St. Rep. 150, and note. A decree of a probate court pronounced upon a subject over which it has no jurisdiction is null and void: *Smith v. Wildman*, 178 Pa. St. 245; 56 Am. St. Rep. 760.

EXECUTORS AND ADMINISTRATORS—SALES—CAVEAT EMPTOR.—The rule of caveat emptor applies to probate sales and disappointment in the title is no ground for relief. The purchaser is bound to see that the proceedings are sufficiently regular to authorize the sale: *Smith v. Wildman*, 178 Pa. St. 245; 56 Am. St. Rep. 760, and note.

MISTAKE OF LAW—RELIEF IN EQUITY—ESTOPPEL.—Equity will not relieve against a pure mistake of law, if there is no fraud, imposition, misrepresentation, undue influence, imbecility of mind, misplaced confidence, or other special circumstances of a similar character, inferable from the transaction: See monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 501. When everything is equally known to both parties, although they are mistaken as to their legal rights, no estoppel arises: *Estis v. Jackson*, 111 N. C. 145; 32 Am. St. Rep. 784, and note. Equitable estoppel arises only when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act upon that belief so as to alter his previous position to his prejudice: *De Berry v. Wheeler*, 128 Mo. 84; 49 Am. St. Rep. 538, and note.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

ANGIER v. WESTERN ASSURANCE COMPANY.

[10 SOUTH DAKOTA, 82.]

INSURANCE—PROOFS OF LOSS—DELAY IN OBJECTING TO.—A delay for eighteen days after the receipt of proofs of loss, if unexplained in making objections thereto, is a waiver of any defects therein.

INSURANCE—PROOFS OF LOSS—WAIVER OF BY DENYING LIABILITY.—If the insurer denies his liability for a loss, he thereby waives any defects which may exist in the proofs of loss thereof submitted to him.

INSURANCE—INCREASE OF HAZARD BY NEGLIGENCE IN THE USE OF KEROSENE.—A stipulation in a policy of insurance against loss by fire that it shall be void if the hazard be increased by any means within the control or knowledge of the assured, does not exempt the insurer from liability resulting from the carelessness or negligence of the assured, as where, from a careless use of kerosene in starting a fire in a stove, fire was communicated to the insured building whereby it was destroyed.

INSURANCE.—An increase of hazard is some alteration or change in the situation or condition of the property insured which tends to increase the risk—something of duration, and not a casual change of a temporary character.

PRACTICE.—One who submits his case on a motion to direct judgment in his favor submits it both upon the facts and the law, and cannot afterward urge that there were questions of fact which should have been left to the jury.

McDonald & Fauntleroy, and C. S. Palmer, for the appellant.

U. S. G. Cherry, for the respondent.

CORSON, P. J. This is an action upon a fire insurance policy. A verdict was directed for the plaintiffs, and the defendant appeals. The complaint is in the usual form, and contains, among other things, the following allegations: "That on or

about the twenty-fourth day of April, 1895, the said defendant, by and through his duly authorized officers and agents, denied and disclaimed all liability whatsoever under said policy, and refused to pay the same or any part thereof. . . . That, immediately after said fire and destruction of said property, the plaintiffs gave said defendant due notice, and thereafter made, executed ⁸⁴ and delivered to the defendant due and regular proof of said fire and loss, which proof was made and delivered on the eighth day of May, A. D. 1895, and was in words and figures following, to-wit: "The answer of defendant admits that proofs of loss were furnished, but denies that the plaintiffs complied with the terms and conditions of said policy; and it alleges that, upon receipt of proofs of loss, it immediately objected to the same and notified the said plaintiffs that they were insufficient, and did not comply with the terms of the said policy, in that they did not state the knowledge and belief of said insured as to the origin of said fire, and that the plaintiffs refused and neglected to furnish other proofs. And, for a second defense to said cause of action, the defendant alleges, in effect, that the plaintiffs caused the loss of the building by using kerosene oil in making a fire upon the insured premises, and that, by reason of said unlawful acts of the said plaintiffs, the hazard and damages to said property, being destroyed by fire, was greatly increased by said means and acts, and that it was by reason of such unlawful acts that the building was destroyed by fire." It will thus be seen that the defendant bases its defense to plaintiffs' action upon two grounds, namely, failure to furnish proper proofs of loss, and increase of hazard by reason of the use of kerosene oil on the premises in the manner detailed in the answer. The two questions will be considered in the order above named.

The proofs of loss were forwarded within the proper time, and stated that "a fire occurred on the twenty-fourth day of March, A. D., 1895, . . . and originated as follows, viz.: Caught from stove." The policy provides that proofs of loss shall state "the knowledge and belief of the insured as to the time and origin of the fire." Appellant contends that this statement was insufficient. Plaintiffs make three answers to appellant's contention: 1. They insist that the statement in the proofs of loss was sufficient; 2. That the plaintiffs had, prior to the proofs of loss being forwarded, made a full and complete statement of all the facts relating to the origin of the fire to the ⁸⁵ duly authorized agent of the defendant; 3. The defendant

had waived proofs of loss by the declaration of their authorized agent that the company absolutely refused to pay the loss, and by failure to notify the plaintiffs, within reasonable time after the receipt of the proofs of loss, that the defendant objected to them. The building was destroyed by fire, as will be seen, March 24, 1895, and the proofs of loss were forwarded by mail May 8, 1895, and were received by the defendant May 10th. The defendant made no objection to these proofs until May 28th, eighteen days after their receipt, and five days after the expiration of the sixty days in which proofs were to be furnished. Section 4178 of the Compiled Laws provides: "All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived." There was no evidence offered to explain the delay in making the objection to the proofs in this case, and a delay of eighteen days, unexplained, must be held to be unnecessary delay. The defect, if any, in the proofs, was waived, and the proofs were properly admitted in evidence. Again, it clearly appears, both from the evidence of plaintiff Stevens and the letter calling for a more specific statement as to the origin of the fire, that the authorized agent of the defendant had denied the liability of the defendant for the loss. In the letter of May 28th, Mr. Crandall, writing for the company, says: "You are further advised that if the verbal statement made to me, in the presence of Mr. Allen and his clerk, regarding the origin of the fire, is true, to wit, that 'it originated by pouring kerosene oil into the stove in which a fire had been started,' then and in that case this company denies any and all liability under said policy, and you can commence your action to recover as soon as you think best." The company, therefore, had full knowledge of the origin of the fire, and also, by its denial of liability, waived further proofs of loss.

The second defense is based upon the following stipulation in the policy: "This entire policy shall be void . . . if ^{so} the hazard be increased by any means within the control or knowledge of the insured, . . . or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, . . . phosphorus or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for light, and kept for sale according to the law, but in quantities not exceeding five barrels, provided it be

drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light)." Section 4175 of the Compiled Laws provides: "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of his agent or others." The facts in regard to the origin of the fire are thus stated by the plaintiff Stevens on cross-examination, and are undisputed: "I took a tomato can, maybe two-thirds or half-full of kerosene oil, and put some of the oil on the kindling. I turned to strike a match to set it afire. I had on a pair of celluloid cuffs, and the flame caught on my cuffs, and in a moment they blazed up. I had the can in my left hand and it fell on the floor, and the fire caught in the stove the same time. I rushed out and tried to get my coat off. Q. And the whole thing caught fire and burned up? A. Yea. Q. How much oil would that tomato can hold? A. A pint or so. . . . Q. You put the oil on the wood, and struck a match for the purpose of lighting this coal oil? A. Yes, sir. Q. And it fell on your celluloid cuff, you say? A. Yes, sir. Q. And that set fire to the cuff, and the fire fell down on the oil in the stove? A. Yes, sir." As will have been observed, there is no clause in the policy prohibiting the plaintiff from keeping kerosene oil upon his premises to the extent of five barrels, United States standard, and there is no evidence that the oil used by plaintiff was below the prescribed standard. The quantity on hand at the time of the fire was less than one gallon. In view of the stipulation in the policy, the provisions of the statute, and the evidence, it is ⁸⁷ somewhat difficult to comprehend the theory of the defendant. It seems to be contended that the kerosene oil, used in the manner testified by the plaintiff Stevens, increased the hazard, and therefore relieved the defendant from liability. Undoubtedly, the use of the kerosene in the manner detailed by the witness was a careless and negligent act, but it was not such an act as is understood by the term "increase of hazard." The stipulation of the policy is that "the entire policy . . . shall be void . . . if the hazard be increased by any means within the control or knowledge of the insured." Keeping kerosene upon the premises in no manner violated the stipulations of the parties, and could not, therefore, be held to constitute an increase of the hazard, within the meaning of the policy. The term "increase of hazard" denotes an alteration or change in the situation or condition of the property insured which tends to increase the risk. These words imply something

of duration, and a casual change of a temporary character would not ordinarily render the policy void, under the stipulations therein contained: *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475; 35 Am. St. Rep. 508. In that case the supreme court of Massachusetts held the use of naphtha (the use or keeping of which on the insured premises was prohibited by the policy) for a period of a month, in burning paint from the outside of a wooden church, and causing the burning of the church, constituted such a change or alteration, and was sufficiently long continued to be deemed a change in the situation or circumstances affecting the risk. In *Lyman v. State Mut. etc. Ins. Co.*, 14 Allen, 329, three weeks was held sufficient.

In the case at bar, the contention of counsel for appellant that the use of kerosene oil at only one time, in the manner detailed, constituted an increase in the hazard, in the sense in which that term is used in the policy, is not tenable. It, as we have said, constituted negligence on the part of the plaintiffs, but did not increase the hazard in the sense that the term is used in the policies of insurance. But, as we have seen, under the provisions ^{ss} of our statute, neither the negligence of the insured nor of his agents or others exonerates the insurer from liability: *Comp. Laws*, sec. 4175. This section of the Civil Code, as appears from the revisor's notes to the corresponding provision of the code prepared for the state of New York, is based largely upon *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Gates v. Madison Ins. Co.*, 5 N. Y. 469; 55 Am. Dec. 360; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Waters v. Merchants' etc. Ins. Co.*, 11 Pet. 213. In the latter case, the supreme court of the United States, speaking by Mr. Justice Story, says: "This question has undergone many discussions in the courts of England and America, and given rise to opposing judgments in the two countries. As applied to policies against fire on land, the doctrine has for a great length of time prevailed that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of the policies, and, as such, recoverable from the underwriters. It is not certain upon what precise grounds this doctrine was originally settled. It may have been from the rules of interpretation applied to such policies containing special exceptions, and not excepting this; or it may have been, and more probably was, founded upon a more general ground, that, as the terms of the policy covered risks by fire generally, no exception ought to be introduced by construction, except that of fraud of the assured,

which, upon the principles of public policy and morals, was always to be implied. It is probable, too, that the consideration had great weight that otherwise such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur which could not be traced back to some carelessness, neglect, or inattention of the members of the family." In *Gates v. Madison Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360, the court of appeals of New York use the following language: "But another question arises upon the evidence offered, namely, whether a loss occurring from the gross carelessness and negligence of the insured, his servants, or others, is within this policy. There can ^{be} no doubt that one of the objects of insurance against fire is to protect the insured from loss, as well against his own negligence as that of his servants and others; and therefore the simple fact of negligence in either, however great in degree, has never been held to be a defense in such a policy." The case of *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713, 41 Am. Dec. 661, was a case closely analogous to the one at bar. The sixth plea interposed to the declaration was as follows: "The sixth plea avers that, just before the loss in the declaration mentioned, the plaintiffs, their servants and agents, caused the said steamboat to be put on a dock, by means of which dock the boat was raised out of and above the surface of the river, and so continued until the loss; and, while the boat was in that situation, the plaintiffs, their servants and agents, caused a fire to be made and kept in a stove on the deck of the boat, and caused large quantities of picked oakum to be placed and spread upon the deck of the boat, about and near the fire so made and kept by the plaintiffs, their servants and agents, whereby and by means whereof the peril and danger of consuming, burning, and destroying said boat by fire was enhanced and increased, without the knowledge, privity, or consent of the defendants, contrary to the tenor and effect, true intent, and meaning of the policy." In one or more of the other pleas it was alleged that the oakum so placed near the stove caught fire, and thereby caused the burning of the boat. The court held that the facts stated in the several pleas constituted no defense to the action. In that case the prior decisions were fully reviewed in a very able and exhaustive opinion. Since the decision of *Walker v. Maitland*, 5 Barn. & Ald. 171, in England, in 1821, and *Waters v. Merchants' etc. Ins. Co.*, 11 Pet. 213, in this country, in 1837, the doctrine laid down in those decisions, as applied to fire insurance, has been regarded

as the law: *Billings v. Tolland etc. Ins. Co.*, 20 Conn. 139; 50 Am. Dec. 277; *Perrin v. Protection Ins. Co.*, 11 Ohio, 147; 38 Am. Dec. 728.

The facts in the case at bar were undisputed, and we think the court properly directed a verdict in favor of the plaintiff. ⁹⁰ The defendant suggests that, upon the question of whether or not there is an increase of hazard, the case should have been submitted to the jury, but we are of the opinion that there was no evidence to submit to the jury upon this question. If, however, we are wrong in this conclusion, there was no request on the part of defendant that the case should be submitted to the jury; and, having moved the court to direct a verdict in its favor, it submitted the case to the court upon both fact and law, and it cannot now be heard to say that there were facts to be submitted to the jury: *Yankton Fire Ins. Co. v. Fremont etc. Co.*, 7 S. Dak. 428; *Grigsby v. Western Union Tel. Co.*, 5 S. Dak. 561.

The judgment of the circuit court and order denying a new trial are affirmed.

INSURANCE—WAIVER OF PROOFS OF LOSS.—Although the insured, after a loss has occurred, fails to comply with the stipulation in the policy requiring proofs of loss, the insurer may be estopped to set up such failure as a ground of forfeiture, where defective proofs are accepted without objection: *Morotock Ins. Co. v. Cheek*, 93 Va. 8; 57 Am. St. Rep. 782, and note; or the insurer refuses to pay upon some other grounds: Note to *Hartford Fire Ins. Co. v. Keating*, 68 Am. St. Rep. 509.

As to what Constitutes an Increase of Hazard Avoiding a Policy of Fire Insurance.

In every policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter or change the premises, or alter or change the character or kind of business carried on, or to be carried on there, so as to increase the risk of loss by fire: *Hoffecker v. New Castle County etc. Ins. Co.*, 5 Houst. 101; *Howard v. Kentucky etc. Ins. Co.*, 13 B. Mon. 289. The evolution of the insurance policy which has followed closely the course of insurance law as developed by courts and juries habitually resolving all doubts against the insurer and in favor of the insured, has resulted in a form of contract which leaves little for implication. Provisions against any increase of risk on the part of the insured without the consent of the insurer, are not peculiar to fire insurance, but are found in one form or another in all insurance policies. In life insurance policies the insured is prohibited from changing his occupation to a more hazardous one, and occupations are enumerated and classified with the greatest particularity. In accident insurance, exceptions from liability are made in various cases, as in case of voluntary exposure

to danger; and in fire insurance policies, the general provision against an increase of hazard is supplemented by an elaborate enumeration of prohibited uses of, and changes in, the insured premises, and of hazardous and extrahazardous articles, the keeping or use of which may deprive the insured of his claim to indemnity. In this note, however, we shall confine our attention to fire insurance, and to cases construing provisions like those found in the policy in the principal case, purporting to avoid it "if the hazard be increased by any means within the control or knowledge of the insured."

General Meaning of This Provision.—The construction given the provision in the principal case is approved by authority. The words, "increase of hazard" imply something of duration: *Angier v. Western Assurance Co.*, 10 S. Dak. 82; ante, p. 685. A casual or temporary change will not ordinarily be sufficient to avoid a policy under this provision: *First Congregational Church v. Holyoke Fire Ins. Co.*, 158 Mass. 475; 85 Am. St. Rep. 508; *Harris v. Columblana Ins. Co.*, 4 Ohio St. 286; *Albion Lead Works v. Williamsburg etc. Ins. Co.*, 2 Fed. Rep. 479. A warranty in a policy that no stoves are in an unfinished building means that no stove is habitually kept and used in it, and is not violated by the use of a stove for a few days for the purpose of drying paint in the building: *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219. There must be a direct and permanent appropriation to the prohibited use or purpose: *Merchants' etc. Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy (Ohio), 408; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121. The provision contemplates the exercise by the insured of the usual and necessary acts of ownership: *Jolly v. Baltimore Equitable Soc.*, 1 Har. & G. 295; 18 Am. Dec. 288; *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494; 95 Am. Dec. 748; and when contained in a policy covering livestock, the company is liable for a horse killed at a place not on the premises specified in the policy, if it was being used by the assured in the usual course of business: *Mills v. Farmer's Ins. Co.*, 37 Iowa, 400; *Holbrook v. St. Paul Fire etc. Ins. Co.*, 25 Minn. 229; *Everett v. Continental Ins. Co.*, 21 Minn. 76, where it was similarly held as to a threshing machine: *Plinsky v. Germania etc. Ins. Co.*, 32 Fed. Rep. 47. Neither must it be construed so as to prohibit the insured from making ordinary repairs: *McCluer v. Girard Fire etc. Co.*, 43 Iowa, 349; 22 Am. Rep. 249; *First Congregational Church v. Holyoke Fire Ins. Co.*, 158 Mass. 475; 85 Am. St. Rep. 508. The term "increase of risk" must be construed as meaning an essential increase of risk, and does not cover every use of the property insured by which its liability to fire may be appreciably increased: *Crane v. City Ins. Co.*, 2 Flipp. 576; *Brink v. Merchants' etc. Ins. Co.*, 49 Vt. 442; and does not cover accidental changes which increase the hazard: *Breuner v. Liverpool etc. Ins. Co.*, 51 Cal. 101; 21 Am. Rep. 703; nor every change of risk, for the risk may be changed without increasing the hazard: *Greenlee v. North British etc. Ins. Co.*, 102 Iowa, 427; 63 Am. St. Rep. 455; *Parker v. Arctic Fire Ins. Co.*, 59 N. Y. 1; though under a proper provision the insured may be required to notify the insurer of material alterations in a building which, however, do not increase the hazard: *Frost's Detroit Lumber*

Works v. Miller Mut. Ins. Co., 37 Minn. 300; 5 Am. St. Rep. 846. A general provision against an increase of risk is not restricted or controlled by a preceding specification of hazards so as to make the insurer a special contractor under the specification: **Boatwright v. Aetna Ins. Co.**, 1 Strob. 281. It is an independent condition of itself, and an act done by the insured, although not included in the class of specified hazards, avoids the policy if it increases the hazard: **Dittmer v. Germania Ins. Co.**, 23 La. Ann. 458; 8 Am. Rep. 600. It has been held also that although cotton in bales is enumerated among hazardous articles in a policy, yet if it is merely kept for sale as a part of a stock of dry goods insured, it does not vitiate the policy, unless the jury find that the keeping of such cotton increases the risk: **Moore v. Protection Ins. Co.**, 29 Me. 97; 48 Am. Dec. 514. A general provision against an increase of hazard is not abrogated or deprived of effect by a written permission given to the insured in the policy to complete the insured buildings, the insurance being a "builder's risk": **Franklin Brass Co. v. Phoenix Assn. Co.**, 65 Fed. Rep. 773.

Increase of Hazard Need not Cause Loss.—It has been repeatedly held in Illinois that an increase of hazard on the part of the insured only suspends the policy during the continuance of the increased hazard, and that when it terminated, the insurer's liability reattaches: **New England Fire etc. Co. v. Wetmore**, 32 Ill. 245; **Schmidt v. Peoria Marine etc. Ins. Co.**, 41 Ill. 295; **Insurance Co. of N. A. v. McDowell**, 50 Ill. 120; 99 Am. Dec. 497. The Illinois supreme court, in **Trader's Ins. Co. v. Catlin**, 163 Ill. 256, reviewed this doctrine and reaffirmed its adherence thereto. Being urged by counsel to overrule its previous decisions because contrary to the current of authority, the court said: "These decisions, whilst in conflict with the courts of New York and other states, have so long been the rule in this state that we are not disposed to qualify or in any manner depart from the rule announced therein. That rule is, though there be a change of risk, by reason of an increased hazard, which would avoid the policy if declared forfeited by the company, yet, where the company has not declared the policy forfeited, and the cause of the increased hazard no longer exists, and there is no increased hazard by reason of former changed conditions, then, the policy being for insurance for a certain period, the contract of insurance will be construed, and the fact determined whether there was an increased risk at the time of the fire which in any manner was conducive to the loss. If a loss occurs during the increased hazard a recovery will be defeated. If a former increase of hazard has ceased to exist, and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage. . . . This construction and the rule to which we adhere are more consonant with sound reason than is the rule adopted by those courts with which we are not in accord. That a recovery on a policy on a building in the center of the burned district in Chicago's great fire should be defeated because a gallon of gasoline was therein kept and used a year before that time does not commend itself

as a reasonable rule": See *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. St. 407.

Such, however, is not the general rule, and it is worthy of notice that the case of *New England Fire etc. Co. v. Wetmore*, 32 Ill. 221, from which the Illinois doctrine dates, arose over a policy containing a provision that in case the insured premises should, at any time during the continuance of the policy in force, be used for any purpose specified in the memorandum of special hazards "then and from henceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect." Stables were enumerated as special hazards and part of the insured premises had been used as a stable before the fire, but was not being so used at the time of the fire. The court based its holding that the insurer was liable upon the quoted provision, and later Illinois cases have insisted upon a similar holding where no such enabling provision appeared in the policy. In the absence of an express provision, it is held to be settled law that an increase of risk caused by changes in the premises or their surroundings, does not avoid the policy, unless responsible in whole or in part for the loss: *Washington Fire Ins. Co. v. Davison*, 30 Md. 91. To the reasoning of the Illinois court is opposed that of the cases adhering to the general rule. It is to be borne in mind in this connection that the provision against an increase of risk contemplates something of duration, permanence, and habit, and that every casual, necessary, incidental increase of hazard will not avoid the policy.

Where insurance was obtained on a bowling-alley and pool-table, the policy providing for its avoidance if the insured should keep "gunpowder or other articles subject to legal restrictions," there was a temporary period during the continuance of the policy when the insured was not licensed to keep the insured property for hire. It was held that the temporary illegal use of the property did not prevent the revivor of the policy after such use was discontinued: *Hinckley v. Germania Ins. Co.*, 140 Mass. 38; 54 Am. Rep. 445. "As between the insurer and insured," says the court, "there is no reason why the former should be allowed to avail himself of a temporary illegal use, like that which existed in the present case, unless it can be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected": See *Worthington v. Bearse*, 12 Allen, 382; 90 Am. Dec. 152; *Lane v. Maine Ins. Co.*, 12 Me. 44; 28 Am. Dec. 150; *Power v. Ocean Ins. Co.*, 19 La. 28; 36 Am. Dec. 665; *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573. In the case quoted, however, the provision violated was not the one being considered in this note; indeed, it makes an exception where an illegal use might increase the hazard. In *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, the same court considered the effect of a temporary increase of risk, occasioned by the illegal sale of intoxicating liquors in the insured premises. In criticizing *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, 54 Am. Rep. 445, the opinion is expressed that it would have been better in that case to have left it an open question "whether a departure from the terms

of the provision of the policy, without an increase of risk, may be deemed merely to suspend, and not to absolutely avoid, the policy." "However that may be," says the court, "we think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured, by his voluntary act, increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. . . . An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that, in case of an increase of risk which is consented to or known by the assured, and not disclosed or the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk." To the same effect are *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen, 329; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361; *Howell v. Baltimore Equitable Soc.*, 16 Md. 377; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Merriam v. Middlesex Mut. Fire Ins. Co.*, 21 Pick. 162; 32 Am. Dec. 252. Compare *Boatwright v. Aetna Ins. Co.*, 1 Strob. 281. The doctrine of *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, was approved by the supreme court of the United States in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, though in the latter case a forfeiture of the policy was claimed because of breach by the insured, not of the general provision against an increase of risk, but of a provision forbidding the insured, without the insurer's consent, to employ mechanics in building, altering, or repairing the insured premises. The court held that since the parties had stipulated that a breach of this provision should forfeit the policy, they must be held to their contract, and that it was wholly immaterial that the alterations were completed before the fire occurred, and in no way occasioned it.

Knowledge or Control of Insured—Act of Tenant.—A provision against any increase of hazard "without the written consent of the company" refers only to a change produced by the act of the insured; and not to one occasioned by an accident over which he had no control: *Breuner v. Liverpool etc. Ins. Co.*, 51 Cal. 51; 21 Am. Rep. 703; and does not cover wrongful acts of third persons forbidden and unauthorized by the insured: *Loud v. Citizen's Mut. Ins. Co.*, 2 Gray, 221. But if employes of the insured habitually commit acts increasing the hazard, the law will, under proper circumstances, impute to the insured knowledge thereof and hold the policy avoided: *Farmers' etc. Ins. Co. v. Simmons*, 30 Pa. St. 299. Where a tenant of the insured premises, with the knowledge of the insured, makes alterations of the premises substantially increasing the risk for a considerable period, the policy is, of course, avoided: *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen, 329. A like result has been held to follow where a tenant, without the knowledge or consent of the insured, violates an express warranty in the policy, as where he

keeps gunpowder in the premises, the same being prohibited by the policy: *Fire Assn. v. Williamson*, 26 Pa. St. 196; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; 22 Am. Dec. 539; or other hazardous articles: *Liverpool etc. Ins. Co. v. Gunther*, 115 U. S. 113; or where the forbidden acts were by the authorized agents of the insured's lessee: *Gunther v. Liverpool Ins. Co.*, 134 U. S. 110; or where, without the insured's knowledge or consent, his tenant uses the premises for an unlawful purpose: *Kelly v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530. Compare *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310; 29 Am. Rep. 149. This, upon the ground that the act of the tenant is that of his landlord: *Fire Assn. v. Williamson*, 26 Pa. St. 196, and that "the question whether a warranty has been broken can never be made to depend upon the knowledge or ignorance or intent of the party making it touching the acts or the fact constituting the breach: *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530.

Where a policy of insurance was conditioned to be avoided if any hazardous trade increasing the risk should be carried on in the insured premises without the insurer's knowledge and permission, a forfeiture thereunder is not avoided by the fact that a hazardous trade was so carried on without the insured's knowledge or consent by his tenant: *Howell v. Baltimore Equitable Soc.*, 16 Md. 377; similarly where the provision was against an increase of risk "by any means whatever, without the consent of the insurer": *Long v. Beeher*, 106 Pa. St. 466; 51 Am. Rep. 532. Where the provision is against an increase of hazard "by any means within the control or knowledge of the insured," as in the principal case, the weight of authority maintains that the insured, in the absence of negligence, is not to be prejudiced by any increase of hazard made by his tenant, without his knowledge or consent: *Merrill v. Insurance Co. of N. A.*, 23 Fed. Rep. 245; *North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *Waggonick v. Westchester Fire Ins. Co.*, 34 Ill. App. 629; *White v. Mutual Fire Assur. Co.*, 8 Gray, 566; *Sanford v. Mechanics' Mut. Fire Ins. Co.*, 12 Cush. 541; *Nebraska etc. Ins. Co. v. Christensen*, 29 Neb. 572; 26 Am. St. Rep. 572; *Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. St. 100; *Franklin Fire Ins. Co. v. Gruyer*, 100 Pa. St. 266. Compare *Padelford v. Providence Mut. Fire Ins. Co.*, 3 R. I. 102; 67 Am. Dec. 496; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray, 185. This rule is based upon a strict reading of the condition of forfeiture, and upon the principle that a landlord is bound by acts of his tenant beyond the scope of any relation of agency which may be shown to subsist between them. The lessee holds by virtue of a legal title to the possession, and "the lessor is not responsible for the acts of the lessee in the use of the demised premises, any more than a grantor for those of his grantee." *Sanford v. Mechanics' Mut. Fire Ins. Co.*, 12 Cush., 541.

Use of adjoining premises.—Where an insurance policy provides that if the hazard is increased without the consent of the company in writing the policy shall be void, the provision of forfeiture "should be construed as only applying to the insured premises, or

to property under the control of the insured. There is nothing in the language used which would extend it to the property not under his control, and the acts of others, and hold him responsible for the acts of his neighbors or of contiguous owners, and require him to keep informed as to the manner in which other persons in the neighborhood used their property, or to communicate the facts to the insurer:" *State Ins. Co. v. Taylor*, 14 Colo. 499; 20 Am. St. Rep. 281. So, under a provision covering any increase within the knowledge of the insured, or under his control, the policy cannot be forfeited in absence of such knowledge or consent on his part: *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. St. 266. The insured must give notice to the company only of changes in the use or occupancy of adjoining premises of which he had knowledge, and by which he knew the rate of insurance would be increased: *Rife v. Lebanon Mut. Ins. Co.*, 115 Pa. St. 530; 2 Am. St. Rep. 580. A building erected twenty-five feet from an insured building is not "contiguous thereto": *Olson v. St. Paul Fire etc. Co.*, 35 Minn. 432; 59 Am. Rep. 333; and in order to avoid a policy because of an increase of risk from unauthorized additions to an insured building, it must be shown that the danger of fire was thereby increased: *Mitchell v. Mississippi Ins. Co.*, 42 Miss. 53; 48 Am. St. Rep. 535.

Burden of Proof—Increase of Hazard a Question for Jury.—It is a settled rule that when, in a suit upon an insurance policy, the insurer sets up a forfeiture thereof growing out of a violation by the insured of the provision against an increase of hazard, the burden is cast upon the insurer to prove such violation affirmatively: *Merrill v. Insurance Co. of N. A.*, 23 Fed. Rep. 245; *Greenlee v. Mercantile Ins. Co.*, 102 Iowa, 427; 63 Am. St. Rep. 455; *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180; *Ritter v. Sun Mut. Ins. Co.*, 40 Mo. 40; *Renshaw v. Missouri State Mut. Fire etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904; *Padelford v. Providence Mut. Fire Ins. Co.*, 3 R. I. 102; 67 Am. Dec. 496; *Planters' Ins. Co. v. Sorrells*, 1 Baxt. 352; 25 Am. Rep. 780. This rule is not changed by an allegation in the complaint that the insured has performed all the conditions of the policy: *Newman v. Springfield Fire etc. Ins. Co.*, 17 Minn. 122. It is equally well settled that what constitutes an increase of hazard within the provision of an insurance policy is one of fact for the jury to be determined from the evidence, under proper instructions from the court: *Crane v. City Ins. Co.*, 2 Filpp. 576; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Daniels v. Equitable Fire Ins. Co.*, 48 Conn. 105; *Jolly v. Baltimore Equitable Soc.*, 1 Har. & G. 295; 18 Am. Dec. 288; *Bankhead v. Des Moines Ins. Co.*, 70 Iowa, 387; *Collins v. Merchants etc. Ins. Co.*, 95 Iowa, 540; 58 Am. St. Rep. 438; *Rice v. Tower*, 1 Gray, 426; *Gamwell v. Merchants' etc. Mut. Fire Ins. Co.*, 12 Cush. 167; *First Congregational Church v. Holyoke Fire Ins. Co.*, 158 Mass. 475; 35 Am. St. Rep. 508; *Smith v. German Ins. Co.*, 107 Mich. 270; *Ritter v. Sun Mut. Ins. Co.*, 40 Mo. 40; *Griswold v. American Cent. Ins. Co.*, 70 Mo. 654; *Shepherd v. Union Mut. Ins. Co.*, 38 N. H. 232; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295; *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45; *Long v. Beeber*,

106 Pa. St. 468; 51 Am. Rep. 532; Pool v. Milwaukee Mechanics' Ins. Co., 91 Wis. 530; 51 Am. St. Rep. 919.

Matters Constituting an Increase of Hazard—Change in Use.—Where a policy prohibits a change in the use of a building, as a carrying on of any trade which would involve an increase of risk as described in the application and survey, the application is the standard by which to determine if there has been an increase of risk by a change in use: State Mut. Fire Ins. Co. v. Arthur, 30 Pa. St. 315. A statement in a policy of insurance, or in the application therefor, concerning the present use of the insured building, is a warranty of its present use, but not that such use will be continued during the term of the policy: Smith v. Mechanics' etc. Ins. Co., 32 N. Y. 398; Stout v. City Fire Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Joyce v. Maine Ins. Co., 45 Me. 168; 71 Am. Dec. 536; Blood v. Howard Fire Ins. Co., 12 Cush. 472; Rafferty v. New Brunswick Fire Ins. Co., 3 Harr. 480; 38 Am. Dec. 525; May v. Buckeye Mut. Ins. Co., 25 Wis. 291; 3 Am. Rep. 76. A provision against occupancy or use increasing the risk contemplates a new and different use from that to which the property was applied when the policy issued: Whitney v. Black River Ins. Co., 72 N. Y. 117; 28 Am. Rep. 116. It has been held that the changing of sleeping apartments into a house of prostitution is such a change as must be reported to the company: Indiana Ins. Co. v. Brehm, 88 Ind. 578; likewise, the unauthorized occupancy of insured premises by one who pays no rent and conducts a retail liquor store vitiates a policy of insurance containing the provision under consideration: Western Assur. Co. v. McPike, 62 Miss. 740. Spinning and packing hemp in a "storehouse" was held to violate an insurance policy in Wall v. East River Mut. Ins. Co., 7 N. Y. 370. A change in use not occasioning an increase of risk does not raise a forfeiture, as a change from a restaurant to a paint and wagon shop: Esch v. Home Ins. Co., 78 Iowa, 334; 16 Am. St. Rep. 443; the use of a "boarding-house" partly as a bar and billiard-room: Martin v. State Ins. Co., 44 N. J. L. 485; 43 Am. Rep. 397; the drawing of a lottery in "a shoe manufactory": Boardman v. Merrimack Mut. Fire Ins. Co., 8 Cush. 583; or changing a dwelling-house into a boarding-house: Planters' Ins. Co. v. Sorrels, 1 Baxt. 252; 25 Am. Rep. 780, in the absence of special provision in the policy: Biddle v. Coryell, 3 Harr. 377; 38 Am. Dec. 521. See Blood v. Howard Fire Ins. Co., 12 Cush. 472.

Dangerous Machinery, Processes or Articles.—A provision against the occupancy or use of insured premises, so as to increase the hazard, only prohibits a new and different use, and where the insurance is upon a sawmill in which a planer has been occasionally used, the policy is not avoided by such use of the planer subsequent to the issuance of the policy: Whitney v. Black River Ins. Co., 72 N. Y. 117; 28 Am. Rep. 116; similarly as to the continuance of a previous use of a dummy engine on the premises though the risk was increased thereby: Commonwealth v. Hilde etc. Ins. Co., 112 Mass. 136; 17 Am. Rep. 72. An increase of risk is constituted by the use of an engine to propel a cornsheller, and located near insured cribs: Davis v. Western Home Ins. Co., 81 Iowa, 496; 25 Am.

St. Rep. 509; but the use of an engine fifty feet from insured premises for grinding bark does not fall within a prohibition in the policy against the use of "any steam engine temporarily employed for the purpose of threshing out crops of any kind": *Schaeffer v. Farmers' Mut. etc. Co.*, 80 Md. 563; 45 Am. St. Rep. 361. See *Farmers' Mut. Fire Ins. Co. v. Moyer*, 97 Pa. St. 441; *Long v. Beeber*, 106 Pa. St. 466; 51 Am. Rep. 532. The use of a naphtha torch to burn off paint from the insured premises is a change in the circumstances affecting the risk, where such use was continued during a month: *First Congregational Church v. Holyoke Fire Ins. Co.*, 158 Mass. 475; 37 Am. St. Rep. 508; though this cannot always be affirmed as a matter of law: *Smith v. German Ins. Co.*, 107 Mich. 270. Mixing paints in an insured barn, the same being a merely temporary use, is not such a change of use as will avoid an insurance policy: *Billings v. Tolland County etc. Ins. Co.*, 20 Conn. 139; 50 Am. Dec. 277; although if unbaled hay in quantity is stored in insured premises without notice to the insurer, the risk is increased and the policy avoided: *Dittmer v. Germania Ins. Co.*, 23 La. Ann. 458; 8 Am. Rep. 600. Compare *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; 91 Am. Dec. 217. Setting up seven new stoves in an insured hotel increases the hazard: *Fabyan v. Union Mut. Fire Ins. Co.*, 33 N. H. 203; likewise the use of a stove in a room where the insured, by permission of the company, keeps and uses naphtha: *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551. Compare *Daniels v. Equitable Fire Ins. Co.*, 48 Conn. 105. In the principal case, it is held that the use of kerosene to light a fire in a stove situated in the insured premises, while a negligent and careless act, was not an "increase of hazard" within the meaning of the policy: *Angier v. Western Assur. Co.*, 10 S. Dak. 82; ante, p. 685, nor is the temporary use of gasoline for lighting purposes, where the same is discontinued before the loss for which it is in no way responsible: *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. St. 407. See, also, *Phoenix Fire Ins. Co. v. Cochran*, 51 Pa. St. 143; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530; 51 Am. St. Rep. 919.

Additions to or Alterations of Premises insured do not per se occasion an increase of the hazard. Their final effect may be a decrease of risk: *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000; *Jolly v. Baltimore Equitable Soc.*, 1 Har. & G. 295; 18 Am. Dec. 288. Unless restricted by the policy, the insured may, without notice to the insurer, make alterations in the insured property not operating an increase of hazard: *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 238; and where there is no provision against the erection of adjacent buildings and the insured should erect a building near the insured property greatly increasing the risk, though not occasioning or influencing a subsequent loss, it has been held that the insured could recover: *Howard v. Kentucky etc. Mut. Ins. Co.*, 13 B. Mon. 282. As we have shown earlier herein, however, this doctrine is controverted. Alterations to avoid a policy, when made without the insurer's knowledge or consent, must be substantial or material alterations: *Mack v. Rochester German Ins. Co.*, 106 N. Y. 560; *Frost's Detroit Lumber etc. Works v. Miller's etc. Mut. Ins. Co.*,

37 Minn. 300; 5 Am. St. Rep. 846. Such alterations may avoid a policy though in no way responsible for the loss of the insured premises: *Merriam v. Middlesex Mut. Fire Ins. Co.*, 21 Pick. 162; 32 Am. Dec. 252; and failure on the part of the insured to notify the insurer thereof avoids the policy absolutely: *Kern v. South St. L. Mut. Ins. Co.*, 40 Mo. 19; *Calvert v. Hamilton Mut. Ins. Co.*, 1 Allen, 308; 79 Am. Dec. 744. The court will not presume that the alteration of flour-mill machinery from the burr to the roller process is such an alteration as would increase the risk: *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236. Additions of the same general character as the insured buildings and used for the same general purposes do not cause an increase of hazard: *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. L. 447; but where insurance was taken out upon certain property, including a kitchen not yet built, the plans of which were communicated to the insurer, any deviation from such plans is to be viewed as an alteration which, if it increase the risk, will avoid the policy: *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45. Permission given in a policy to make "necessary alterations and repairs" does not authorize a material enlargement of the insured premises: *Frost's Detroit Lumber etc. Works v. Millers' etc. Mut. Ins. Co.*, 37 Minn. 300; 5 Am. St. Rep. 846. See *Stetson v. Mutual Fire Ins. Co.*, 4 Mass. 330; 3 Am. Dec. 217; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535; 20 Am. Dec. 547.

Vacancy or Nonoccupancy of Premises.—Known vacancy of insured premises raises a presumption that the hazard is thereby increased; "but this presumption is not conclusive, for the peculiar condition, construction, and surroundings of the building may be such that the presumption will be completely destroyed": *White v. Phoenix Ins. Co.* 83 Me. 279; 85 Me. 97. The phrase "vacant and unoccupied" should be construed as meaning such vacancy and non-occupancy as materially increases the risk: *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384. See *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88. By statute in Maine, mere nonoccupancy does not create a forfeiture of the policy. It must be shown that there was a consequent increase of hazard: *Lancy v. Home Ins. Co.*, 82 Me. 492; *White v. Phoenix Ins. Co.*, 83 Me. 279; but where there is no proof of attendant circumstances, the burden cast upon the insurer to prove an increase of hazard may be sufficiently sustained by the natural presumption above referred to which "is based upon the observation and experience of intelligent men generally": *Jones v. Granite State Fire Ins. Co.* 90 Me. 40. Where premises are vacant when insured, and the insurer has notice of such fact, he cannot claim a forfeiture of the policy because of subsequent unoccupancy, either under the "vacant and unoccupied" or under the "increase of hazard" clause: *Aurora etc. Ins. Co. v. Kranich*, 36 Mich. 289. See *Residence Fire Ins. Co. v. Hammawold*, 37 Mich. 103; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Luce v. Dorchester Ins. Co.*, 110 Mass. 361. A policy is not forfeited by the act of a tenant in vacating the premises without notice to the insured, until the latter had had a reasonable time in which

to comply with the conditions of the policy requiring notice to the insurer of such vacancy: *Moriarty v. Home Ins. Co.*, 53 Minn. 549; and a vacancy of insured premises for fifty-three days before a fire, the same materially increasing the risk, does not prevent a recovery upon the policy by the insured if he had used reasonable exertions in the meantime to procure another tenant: *Gamwell v. Merchants' etc. Mut. Fire Ins. Co.*, 12 Cush. 167. Compare *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 196, 188*.

Liens Upon Insured Premises—Mortgage—Mechanics' Liens—Miscellaneous.—The giving of a mortgage upon insured property, having the effect of decreasing the insured's interest in the property, lessens the insurer's security and increases the hazard. It is immaterial that the mortgage is to secure a debt not yet due: *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379. The effect of a mortgage as an "increase of hazard" was considered in *Crittenden v. Springfield Fire etc. Ins. Co.*, 85 Iowa, 652; 39 Am. St. Rep. 321, where the court in construing a provision in the policy avoiding it if "the risk be increased by any means whatever within the control of the insured," said: "This is the only provision of the policy which we find that can be construed as against subsequent incumbrances. It is a sort of blanket provision, without such specification as to give it legal exactness—that is, to enable the law, from the language used, to define the intent of the parties; as by specifying incumbrances or other facts that would increase the risk, not comprehending in a literal sense so much as to indicate that less was really intended. It is not to be known from the language of the policy the particular facts that the parties contemplated would increase the risk. . . . It was competent for the parties to specify facts that should increase the risk, and where it is not done, but such general language is used, it is, we think, a question of fact for the court whether a particular fact, claimed to increase the risk, was really one that the parties contemplated or not, or, perhaps, whether a particular fact did amount to an increase of risk. It is likely generally true that an incumbrance that lessens the interest of the insured in the property adds to the risk of the insurer, but collateral facts may vary the rule. The usual custom is to provide in terms in the policy against encumbrances except by permission of the company, and where it is not done, as in this case, we are not prepared to hold as a matter of law that the parties designed it": See, also, *Collins v. Merchants' etc. Ins. Co.* 95 Iowa, 540; 58 Am. St. Rep. 438; *Howard Fire Ins. Co. v. Bruner*, 23 Pa. St. 50. Chattel mortgages on growing crops are not to be regarded as increasing the hazard until such crops are harvested: *Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 53 Mich. 306. See *Powers v. Guardian Ins. Co.*, 136 Mass. 108; 49 Am. Rep. 20. It cannot be assumed by the court that the mere commencement of proceedings to foreclose a mortgage on insured premises, of itself, constitutes an increase of hazard which, in the absence of notice or consent, would avoid a policy of insurance: *Phenix Ins. Co. v. Union Mut. Life Ins. Co.*, 101 Ind. 392; nor is such an increase of hazard constituted by the foreclosure of mechanics' liens which had been filed against the insured building when the policy issued:

Greenlee v. Mercantile Ins. Co., 102 Iowa, 427; 63 Am. St. Rep. 453. Other matters which have been considered in construing the provision against an increase of hazard are: change in the location of insured property: Severance v. Continental Ins. Co., 5 Bliss. 156; Plinsky v. Germania etc. Ins. Co., 32 Fed. Rep. 47; Spitzer v. St. Marks Ins. Co., 6 Duer, 6; a change of tenants of insured premises: Gates v. Madison County Ins. Co., 5 N. Y. 469; 55 Am. Dec. 360; Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. St. 419; 98 Am. Dec. 298; shutting down a factory temporarily: Brighton Mfg. Co. v. Fire Assn. of Phila., 33 Fed. Rep. 234. An unexecuted intention to change the use of premises to a more hazardous one does not amount to a violation of a condition against an increase of hazard: United States etc. Co. v. Kimberly, 34 Md. 224; 6 Am. Rep. 325.

BAXTER v. O'LEARY.

[50 SOUTH DAKOTA, 150.]

EXECUTION SALE—CONFIRMATION—ABSENCE OF.—Where a statute declares that on the return of any writ of execution for the satisfaction of which real property has been sold, the court must examine the proceedings of the officer, and, if satisfied that the sale has been made in conformity with the provisions of the statute, must make an order confirming the sale and directing the clerk to enter on the journal that the court is satisfied of the regularity of the sale, and an order that the officer make to the purchaser a deed of such real property, a failure to have the sale confirmed in an action at law is a mere irregularity which will not defeat the purchaser's title, if the proceedings were in all respects regular.

Rice & Polley, for the appellants.

Joseph B. Moore, for the respondents.

¹⁵¹ HANEY, J. This is an action to recover possession of a mining claim. Plaintiffs allege that the claim was located as the Snowstorm lode by Joseph Wilder, in 1877; that he conveyed it by deed to William Bull; that Bull conveyed it by deed to the Milwaukee & Black Hills Mining Company in 1879; that on April 13, 1886, it was sold on execution to Lee R. Baxter, judgment plaintiff in an action at law, to whom a sheriff's deed was issued November 13, 1890; that on April 13, 1886, Baxter entered into a contract with Charles F. Thompson, whereby he sold the claim to him for five hundred and sixty-eight dollars and forty-three cents, which consideration was then paid by said Thompson; that Baxter placed Thompson in possession of the claim and authorized him to have the annual assessment work thereon performed; that Baxter and Thompson caused the requisite work to be done during 1886; that Baxter conveyed the

claim by deed to Thompson January 2, 1891; that Thompson died intestate in May, 1892, leaving as his sole heirs at law the plaintiffs Thomas W. Thompson and Carrie S. Pierce; that on November 13, 1893, the county court made an order of final distribution of the residue of the Thompson estate, including all the property of every kind belonging thereto, to said heirs at law, share and share alike; that while Baxter was seised and possessed and entitled to the possession of the claim, on January 1, 1887, defendant ¹⁵² O' Leary and Collins, without right or title, wrongfully and unlawfully entered into and upon the same, and wrongfully and unlawfully ousted and ejected Baxter therefrom, and still wrongfully and unlawfully withhold possession of the premises from plaintiff; that when the deed from Baxter to Thompson was executed and delivered the defendants wrongfully and unlawfully held possession, claiming title, for which reason Baxter is made a party plaintiff. There are other allegations in the complaint; but enough have been given to explain the questions of law involved. Defendants practically deny all of the foregoing allegations, and allege that no assessment work was done by anyone in 1886, and that the ground in dispute was relocated as the Lackawanna lode, January 1, 1887; that since that time they have been in continuous possession of the claim, have each year performed the required work thereon, and that during such time the plaintiffs have done no work thereon, except a few days' work in 1887; that the Snowstorm lode was of little value in 1887, but because of the sums expended and improvements made by defendants the claim is now worth ten thousand dollars; that neither plaintiffs nor Charles F. Thompson ever took any legal steps to assert any title to the ground in dispute until this action was commenced; that by reason of their long silence and acquiescence, and by permitting defendants to develop the same, plaintiffs are estopped to claim any title thereto. Plaintiffs introduced evidence tending to prove the original location and conveyance from Wilder to Bull, and from Bull to the Milwaukee & Black Hills Mining Company, and that the required assessment work was done in 1886. They then offered the sheriff's deed to Baxter, which was rejected, for the reason that the record failed to show any confirmation of the sale; and, having rested, defendants moved the court to direct a verdict in their favor "upon the ground that plaintiff had failed to connect himself in any way with the title to the Snowstorm lode," which motion was sustained, and defendants had judgment accordingly.

¹⁵³ The contention of defendants that plaintiff's evidence shows a failure to do the required amount of assessment work in 1886, and therefore they cannot recover under any view, is untenable. Such is not the fair and reasonable inference to be drawn from all the evidence, nor was such failure of proof assigned as a ground of defendant's motion to direct a verdict. It does not appear from the abstract when this action was commenced, nor was the question of estoppel raised by the motion to direct the verdict; hence the only question presented by this appeal is, whether the court erred in excluding the sheriff's deed and in directing a verdict for defendant for the reason that plaintiff failed to connect himself with the title. Technically, the deed should have been received, as the statute makes it *prima facie*, evidence of the legality of the sale; but as the parties agreed that thorough search had been made among the records, and no order of confirmation found, it becomes necessary to consider the effect to be given to a sheriff's deed where the sale has not been confirmed. It should be observed that the execution was issued on a valid judgment in an action at law; that the purchaser and grantee in the deed was plaintiff in such action, and that the proceedings are regular in every respect, except the want of confirmation. The statute contains the following provisions: "If the court upon the return of any writ of execution, for the satisfaction of which any real property or interest therein has been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this chapter, the court must make an order confirming the sale and directing the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such real property, or interest therein, at the expiration of one year from the day of the sale, unless the same be redeemed as herein provided. And the officer, after making such sale, may retain the purchase money in his hands, until the court ¹⁵⁴ shall have examined his proceedings, as aforesaid, when he must pay the same to the person entitled thereto by order of the court": Comp. Laws, sec. 5149. "Upon the expiration of the period for redemption, the proper officer must make the purchaser, or the party entitled thereto, a deed of real property sold. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary is proved, and shall vest in the purchaser, or other party as aforesaid, as good and as perfect title

in the premises therein mentioned and described as was vested in the debtor at or after the time when such real property became liable to the satisfaction of the judgment. And such deed or conveyance to be made by the sheriff or other officer must recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of rendition of such judgment, by virtue whereof the said real property was sold as aforesaid, and must be executed, acknowledged, or proved, and recorded as is or may be provided by law, to perfect the conveyance of real property in other cases": Comp. Laws, sec. 5160. The law of Kansas upon this subject is substantially the same as in this state. It is there held that the order of confirmation is an adjudication merely that the proceedings of the officer as they may appear of record are regular, and a direction to the sheriff to complete the sale; that on a motion to confirm the sale the court cannot go behind the execution, nor receive any evidence except as to the regularity of the proceedings; and that, if the return of the officer shows that all the requirements of the statute have been complied with, the sale ought to be confirmed: *Koehler v. Ball*, 2 Kan. 160; 83 Am. Dec. 451; *Challiss v. Wise*, 2 Kan. 193; *White Crow v. White Wing*, 3 Kan. 270. Giving the statute this construction, it seems to follow that the failure to have a sale on a judgment in an action at law confirmed is a mere irregularity, which will not defeat the purchaser's title where the proceedings are shown, as in this case, to be in all respects regular, and in conformity with the statute. A sheriff's sale may be confirmed at ¹⁵⁵ any time after the sheriff has made his return, on motion of any person interested therein, or on the court's own motion and without the consent of the sheriff: *Ferguson v. Tutt*, 8 Kan. 370. In this state the practice is to confirm without notice. The proceeding is purely ex parte, and we think the only effect which should be given it is to preclude inquiry concerning the regularity of the sale as shown by the officer's return. If such return, when introduced in evidence, shows that the sale was made in conformity with law, it is unreasonable to hold that the failure of the court to make a formal ex parte order, which merely approves what appears on the face of the papers, should invalidate a purchaser's title. It should be observed that we are considering a sale in an action at law, wherein the officer acts, not under the direction of the court, as in cases of judicial sales, but under the naked authority of the execution, and the express direction of the statute. Indeed, there is no substantial

reason for requiring the confirmation of such sales. It is required in but few states. Our law would be more consistent and consonant with the trend of modern legislation if the section quoted above were repealed. In construing a similar provision, the supreme court of Ohio at an early day reached a different conclusion: *Curtis v. Norton*, 1 Ohio 278; *McBain v. McBain*, 15 Ohio St. 337; 86 Am. Dec. 478. It is suggested that our statute came from that state burdened with the construction there given it. It may, or it may have come from Kansas. In any event, this court cannot infer that the legislature intended to make the title to real property dependent upon such idle technicalities. When every material fact exists which is necessary to convey a judgment debtor's property to a purchaser when the debtor makes no objection to the transfer, and when every fact essential to such transfer is shown by evidence which we hold to be conclusive upon the court in confirming such transfer, its failure to confirm should have no more serious result than to require the production of the original records upon which the transfer is based. This is especially ¹⁵⁶ true when the regularity of the proceedings is attacked collaterally by one who does not claim through or under the judgment debtor. If the court had jurisdiction to render the judgment, and every requirement of the statute as to the sale has been complied with, and the judgment debtor has made no complaint, we can see no valid reason why these defendants, who claim nothing from such debtor, should be heard to object to plaintiff's title: *Paine v. Spratley*, 5 Kan. 525. Defendants attempted to secure this mining claim by means of a relocation, on the theory that the requisite work was not done in 1886. Certainly Baxter had, by reason of his purchase, acquired a right to do the work in that year. If, as alleged, he caused the required work to be done, the ground was not open to relocation. As heretofore intimated, no opinion is expressed upon defendant's plea of estoppel, nor is it intended by this decision to preclude the parties from litigating the issue as to what amount of work was done by defendants in 1886. It follows that the court erred in excluding the sheriff's deed, and in directing a verdict for defendants.

The judgment is reversed and a new trial ordered.

EXECUTION SALES—NECESSITY OF CONFIRMATION.—The confirmation of the report of a sheriff's sale is usually necessary to its validity: *Tooley v. Gridley*, 3 Smedes & M. 493; 41 Am. Dec. 628. A sale under a decree is not conclusive until confirmed: *Taylor v. Cooper*, 10 Leigh. 317; 34 Am. Dec. 737. But a public officer authorized by a court of record to sell lands is also authorized to

convey, and the validity of the title does not depend on the return of the sale and its confirmation: *Williamson v. Farrow*, 1 Bail. 611; 21 Am. Dec. 492. Failure to make a return is a defect in form merely and not in substance: *Williamson v. Farrow*, 1 Bail. 611; 21 Am. Dec. 492. As to the effect of orders confirming judicial sales, see monographic note to *Watson v. Tromble*, 29 Am. St. Rep. 495-499.

STATE v. TAYLOR.

[10 SOUTH DAKOTA, 182.]

AN OFFICIAL BOND WITH A PENALTY IN EXCESS OF THAT PRESCRIBED BY STATUTE, voluntarily given, may be enforced to the whole amount thereof, where the statute declares that no official bond shall be void for want of compliance with the statute, but shall be valid for the matters therein contained.

John H. Perry, Thomas Sterling, F. B. Korns, and C. T. Howard, for the appellants.

Coe I. Crawford, attorney general, for the state.

¹⁸³ CORSON, P. J. This is an action upon the official bond of William Walter Taylor as state treasurer. Taylor made no defense, but his sureties appeared and answered. The trial was to a jury, and a verdict was directed by the court for the plaintiff, and the sureties appeal.

The bond was in the usual form, except that the penalty was \$350,000, instead of \$250,000, prescribed by the statute. At the close of the evidence, the counsel for the state moved the court to direct a verdict for the full sum of Taylor's defalcation, ascertained to be \$344,277.45, to which the following objection was made. The sureties objected for the reason that they were not liable for a sum greater than \$250,000, the amount of the bond prescribed by the statute. The objection was overruled, and the appellants excepted. The assignment of errors are that said circuit court erred in directing a verdict against said appellants for a sum greater than \$250,000, and that said court erred in entering judgment for a sum greater than the penalty prescribed by the statute.

It is provided by section 6 of chapter 93 of the Laws of 1891 that the bond of the state treasurer shall be in the penal sum of \$250,000. The learned counsel for the appellants contend that, as the penalty of the state treasurer's bond is fixed by statute at \$250,000, the court should have limited the recovery upon the bond in suit to that sum, notwithstanding the penalty specified ¹⁸⁴ in the bond is \$350,000; and they insist that the judgment entered in excess of the \$250,000 is erroneous as against

the sureties upon the bond, and that it should, therefore, be reversed, or modified. The learned attorney general contends that the bond, having been executed voluntarily, and upon a sufficient consideration, should be regarded as a voluntary or common-law bond, given in lieu of a statutory bond, and as such can be enforced to the full amount of the penalty therein specified; and that the judgment for the sum of \$344,277.45, being less than the penalty specified in the bond, should be affirmed. The only provision contained in the statutes of this state upon the construction to be given to official bonds is section 1382 of the Compiled Laws, which reads as follows: "The bonds and oaths of all civil officers shall be construed to cover duties required by law subsequent to giving them; and no official bond shall be void for want of compliance with the statute, but it shall be valid in law for the matter contained therein." Precisely what the legislature intended by the clause, "but it shall be valid in law for the matter contained therein," is somewhat difficult to determine, unless it intended to hold bonds valid as voluntary or common-law bonds when they failed to conform to the statutory requirements. But, whether this was the intention of the law-making power or not, it is clear that by this provision it intended that no official bond should be held invalid by reason of a failure to comply with the terms of the statute, and that it should be held "valid in law for the matter contained therein." This would undoubtedly include the penalty as well as the conditions contained in the bond. In the earlier cases upon the subject of official bonds not executed in conformity with the statute, it was strenuously contended by counsel for the defendants in those cases that the bonds were void, and could not be enforced, but the courts were disinclined to so hold, and either held them valid to the extent they conformed to the statute, or valid as common-law bonds, when voluntarily executed upon sufficient consideration: *United States v. Tingley*, 5 Pet. 185 115; *United States v. Bradley*, 10 Pet. 343. The general rule in regard to such bonds under one line of decisions is thus stated by the supreme court of Massachusetts in *Bank of Brighton v. Smith*, 5 Allen, 413: "The rule of law is well settled that a bond given for the faithful performance of official duties, or in pursuance of some requirement of law, may be valid and binding on the parties, although not made with the formalities, or executed in the mode provided by the statute under which it purports to have been given. The rule rests upon the principle that, although the instrument may

not conform to the special provisions of a statute or regulation in compliance with which the parties executed it, nevertheless it is a contract voluntarily entered into upon a sufficient consideration, for a purpose not contrary to law, and therefore it is obligatory on the parties to it in like manner as any other contract or agreement is held valid at common law: *Morse v. Hodsdon*, 5 Mass. 314; *Burroughs v. Lowder*, 8 Mass. 373; *Sweetser v. Hay*, 2 Gray 49." This rule is fully sustained by the supreme court of the United States: *United States v. Linn*, 15 Pet. 290; *United States v. Hodson*, 10 Wall. 395. In the latter case the court, speaking through Mr. Justice Swayne, after commenting on the case of *State v. Findley*, 10 Ohio 51, says: "But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Everyone is presumed to know the law. Ignorance, standing alone, can never be the basis of a legal right. If a bond is liable to the objection taken in this case, and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it; but where it is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of rights of the government and ¹⁸⁶ of the liability of the obligors." In the former case, an instrument purporting to be the bond of the receiver of public lands, being without seal, was held not to be a bond, within the meaning of the statute; but the court further held that, being a contract entered into by competent parties and founded upon a sufficient consideration, it was a valid contract at common law, and could be enforced against the principal and sureties: *Goodrum v. Carroll*, 2 Humph. 490; 37 Am. Dec. 564; *State v. Findley*, 10 Ohio 51; *Garretson v. Reeder*, 23 Iowa, 21. Two decisions have been called to our attention in which the courts have held that bonds, the penalty in which was in excess of the statutory requirements, were valid to the extent of the prescribed penalty, but void as to the excess. The first is *M'Caraher v. Commonwealth*, 5 Watts & S. 21, 39 Am. Dec. 106, decided by the supreme court of Pennsylvania in 1842. The opinion of the court upon this point is brief, and the question does not seem to have received very full consideration. The other is *Graham v. State*, 66 Ind.

386. An examination of this case discloses the fact that the decision was based largely, if not entirely, upon the Indiana statutes, in which, among other things, it is provided that such a bond shall not be invalid, nor the principal or surety discharged, "but the principal and surety shall be bound by such bond to the full extent contemplated by the law requiring the same." Other sections of their statute are referred to by the court bearing upon the question, and it concludes its opinion upon this branch of the case as follows: "Construing these statutory provisions all together, we think it clear that the legislature intended that, whatever departure there may have been from the provisions of the statute requiring the bond, in taking it, as to its form or substance, which includes the amount of the penalty named in it, the principal and surety should be bound upon it, to the same extent, and no further, as if the bond had been in all respects such as the law requires; in other words, that the principal and surety should be deemed liable on such a bond as the statute requires." There are other ¹⁸⁷ cases cited holding the very familiar doctrine that, when there are several conditions in a bond, some of which are valid and others invalid, and the valid and invalid provisions can be separated, the bond will be held good as to the valid provisions, and void as to the others, unless the entire bond is declared void by the statute. But that question is not involved in this case. There is no provision in the statute prohibiting parties from entering into a contract assuming a greater liability than that prescribed in the statute, or that makes a bond void for the excess. It is true, Taylor could not have been required to furnish a bond in excess of \$250,000; but he and his sureties were at liberty to assume a greater liability if they chose to do so. The principal and sureties have voluntarily assumed this greater liability upon a sufficient consideration. Upon what theory consistent with any recognized principle of law can this court relieve the appellants, and reduce their liability to \$250,000? The statute has conferred upon the court no such power, except as a court of equity, when the pleadings and proofs are such as to authorize the court to reform the instrument. But in such case fraud, mistake, or some other ground recognized by courts of equity must be alleged and proven to entitle the parties to relief. Various defenses are interposed to the complaint in this action, but there is no defense calling into exercise the equitable power of the court. Counsel for appellants have failed to point out to the court any well-defined theory consistent with the well-

established principles of law upon which this court would be authorized to hold that the appellants are only liable on this bond for \$250,000, notwithstanding their own voluntary agreement to make good the losses of the state to the extent of \$350,000. No fraud, mistake, or coercion being shown by which they were induced to enter into the agreement, this court must presume that the parties intended to assume the liability which they, by their contract or bond, have in fact and in law assumed. In the absence, therefore, of any statute authorizing this court to relieve the appellants ¹⁸⁸ from this contract, we are not aware of any law that would authorize it to change the agreement. We may, in conclusion, repeat substantially the language of the supreme court of the United States in *United States v. Hodson*, 10 Wall. 395. If the bond was subject to the objection now taken in this case, the objection should have been made when the bond was presented for execution; and, having been executed voluntarily, and without objection, there can be no injustice in holding that the bond, as executed, should be the measure of the rights of the state and the liability of the appellants. Our conclusions, therefore, are that the bond, though not in conformity with the statute, was made in pursuance of its provisions, and is a valid and binding obligation to the extent of the penalty named therein; and that the circuit court committed no error in directing a verdict for \$344,277.45—the full amount of Taylor's defalcation—that sum being within the penalty of the bond; and that the judgment entered thereon should be affirmed.

The judgment of the circuit court is affirmed.

Fuller, J., dissenting.

OFFICIAL BONDS—NONCONFORMANCE WITH STATUTE—VALIDITY.—Official bonds will not be declared invalid by the courts, except upon the most cogent and satisfactory grounds. Of course, if a statute which prescribes the conditions and terms of such bonds declares that all bonds not taken pursuant to it shall be void, they will be held void; but unless the statute expressly so provides, only those parts or conditions of the bond that are contrary to the provisions of the statute will be void. A bond executed by a public officer may be good as a voluntary obligation although it may, for various reasons, not be a valid statutory bond: See monographic note to *People v. Hartley*, 82 Am. Dec. 760, 761. Superadded conditions not imposed by the statute may be rejected as illegal, and the conditions required by the statute enforced: *Polk v. Plummer*, 2 Humph. 500; 37 Am. Dec. 566. See *Tevie v. Randall*, 6 Cal. 632; 65 Am. Dec. 547; *Bunneman v. Wagner*, 16 Or. 438; 8 Am. St. Rep. 306.

SWENSON v. CHRISTOFERSON.

[10 SOUTH DAKOTA, 188.]

EXECUTION—PROCEEDINGS AGAINST A SHERIFF FOR NOT MAKING A RETURN—DEFENSE TO.—Under a statute providing that if any sheriff shall refuse or neglect to execute any writ of execution, or to return any writ to the proper court on or before the return day, he shall, on motion, be amerced in the sum of the debt, damages, and costs, with ten per cent thereon to and for the use of the plaintiff, an officer failing to return a writ may relieve himself from liability by proving that the judgment debtor had no property subject to execution during the life of the writ.

C. A. Christoferson, for the appellant.

O. S. Gifford, for the respondent.

¹⁸⁹ HANEY, J. This proceeding was instituted for the purpose of amercing the sheriff for failing to sell personal property under an execution, and failing to return an execution within the time required by law. On July 24, 1895, an execution on a judgment duly entered and docketed in Minnehaha county, and also docketed in Lincoln county, was issued to the ¹⁹⁰ sheriff of the latter county, who levied upon certain personal property belonging to the judgment debtor in such county. Within the time prescribed by the statute, the debtor made a schedule of all his personal property, subscribed and sworn to by himself, and delivered the same to the sheriff, whereon the latter made the following indorsement, returning the schedule to the debtor, and retaining a copy thereof: "Due and personal service by copy admitted, this twenty-sixth day of July, 1895. [Signed] T. W. Smelker, sheriff in and for Lincoln county, South Dakota." The attorney of the judgment creditor was immediately notified of the debtor's claim of exemptions, and an indemnifying bond was demanded by the sheriff. None was given, and the sheriff was directed by such attorney to proceed and sell the property notwithstanding such claim, on the ground that the claim of exemptions was ineffectual, for the reason that a copy of and not the original schedule had been given to the sheriff. On or about January 8, 1896, and before this proceeding was instituted, the execution was returned to the clerk of the court in Minnehaha county, wholly unsatisfied. The judgment debtor did not possess any personal property not included in such schedule, nor any real property liable to execution, when the execution was issued, nor has he since that time had any property beyond the amount of his exemptions. The circuit court

refused to amerce the sheriff and the judgment creditor appealed.

We think there was a substantial, if not strict, compliance with the statute in making the claim for exemptions (Comp. Laws, sec. 5130); and the only question requiring attention is whether the sheriff should be amerced for failing to return the execution within the time required by law. "If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come into his hands, or to sell any personal or real property, or to return any writ of execution to the proper court on or before the return day such sheriff or other officer shall, on motion in court and two ¹⁹¹ days' notice thereof in writing, be amerced in the amount of said debt, damages and costs, with ten per cent thereon to and for the use of the plaintiff": Comp. Laws, sec. 5167. The supreme court of Nebraska, in construing a statute containing the same provisions, uses the following language: "The only new liability sought to be created by the above statute is the penalty of ten per cent. Without the statute, the sheriff would be equally liable for all but the penalty. With it, he is only liable for actual damages, possibly with the penalty added. The statute gives a short, cheap, and expeditious remedy, but it only lies where an action in the nature of trespass on the case would lie." And the court concludes that, where the judgment debtor had no property liable to execution during the life of the writ, the plaintiff could not be damaged by the sheriff's failure to return the writ in time: *Crooker v. Melick*, 18 Neb. 227. Such is the case at bar. The debtor properly claimed his exemptions. There was no property out of which the sheriff could collect the plaintiff's claim, and the sheriff should not have been amerced.

The order appealed from is affirmed.

EXECUTION—FAILURE TO MAKE RETURN—LIABILITY OF OFFICER.—In the United States, many statutes have been enacted for the purpose of giving ample, and in most cases summary and punitive, redress against officers neglecting or refusing to return final process, but, independent of these statutory provisions, the right of a plaintiff to maintain an action against an officer and his sureties for a failure to make a return has been generally conceded. In some of the states, the amount of an officer's liability for such dereliction of duty is fixed by statute, and these provisions are collected in the monographic note to *Sloan v. Case*, 25 Am. Dec. 571-574. Nonreturn of an execution until after the return day does not per se make the sheriff liable in an action: *Commonwealth v. Magee*, 8 Pa. St. 240; 49 Am. Dec. 509. The officer may avoid liability by proving a reasonable excuse for his failure to make the return: *Smith v. Perry*, 18 Tex. 510; 70 Am. Dec. 295. Compare

State v. Buckles, 8 Ind. App. 282; 52 Am. St. Rep. 476; Hawkins v. Taylor, 56 Ark. 45; 35 Am. St. Rep. 82.

ACME MERCANTILE AGENCY v. ROCHFORD.

[10 SOUTH DAKOTA, 203.]

FOREIGN CORPORATIONS—PLEADINGS.—Though a foreign corporation is prohibited from maintaining an action unless it complies with provisions of the statutes of the state, it need not allege such compliance in its complaint. In the absence of any showing to the contrary, it will be presumed to have complied, and, if it has not, the defendant must plead that fact in his answer.

Aikens, Bailey & Voorhees, for the appellant.

Joe Kirby, for the respondent.

204 HANEY, J. This action is by a foreign corporation on two promissory notes executed and payable in this state. It is alleged in the complaint "that at all times hereinafter mentioned this plaintiff has been, and now is, a corporation duly organized and existing according to the laws of Iowa." Defendant demurred upon the following grounds: "That the facts stated in the complaint are not sufficient to constitute a cause of action, and especially in that it appears from the complaint that the plaintiff is a foreign corporation, and that the notes set forth in the complaint were executed and made payable in this state, and it does not appear from the complaint that the plaintiff has in any manner complied with the provisions of chapter 47 of the Laws of 1895, being an act entitled 'An act to amend sections 567 and 569 of the Civil Code, being sections 3190 and 3192 of the Compiled Laws of 1887, relative to the duties of foreign corporations, and to provide penalties for the violation of the provisions of this act'; approved and taking effect March 14, 1895." The demurrer was overruled, and defendant appealed. Under the statute mentioned in the demurrer an action cannot be maintained by a foreign corporation without complying therewith, and, when its failure to have done so affirmatively appears, the action should be dismissed: *Bradley v. Armstrong*, 9 S. Dak. 268. But plaintiff's failure to comply with the statute does not appear upon the face of the complaint. Whether it had or had not done so prior to the commencement of this action is left to be presumed. Its existence is alleged, and the fact that it did business in this state appears. Persons doing business in this state must be presumed to know its laws. All persons are presumed to

comply with the laws of the state wherein they happen to be, or where they transact business. In the absence of any showing to the contrary, it seems to us we may fairly presume that the plaintiff had complied with the requirements of the statute before this action was begun: Comp. Laws, sec. 4909; *Cassaday v. American Ins. Co.*, 72 Ind. 95. The plaintiff's failure to comply ²⁰⁵ with the statute not appearing upon the face of the complaint, the objection should have been taken by answer: Comp. Laws, sec. 4912.

The order of the circuit court is affirmed.

Corson, P. J., dissents.

CORPORATIONS—FOREIGN—POWER TO SUE AND BE SUED—PLEADING.—A foreign corporation is not required to aver that it is a legally incorporated company: *Bennington Iron Co. v. Rutherford*, 3 Harr. 105; 35 Am. Dec. 528; *Lewis v. Bank of Kentucky*, 12 Ohio, 132; 40 Am. Dec. 469. But its existence as a foreign corporation, when put in issue, must be proved like any other fact: *Savage Mfg. Co. v. Armstrong*, 17 Me. 34; 35 Am. Dec. 227.

PARRISH v. MAHANY.

[10 SOUTH DAKOTA, 276.]

APPELLATE PRACTICE.—If a motion for a new trial is made, and the order denying it is not appealed from, the sufficiency of the evidence to sustain the findings cannot be reviewed on an appeal from the judgment.

DEED—WHEN DEEMED RECORDED.—Under a statute making an instrument operative as a record from the time it is filed for record, the grantee should be deemed to have discharged his duty when he has delivered the instrument properly executed and acknowledged to the recording officer, and is entitled to the same protection as if the instrument were at that moment properly recorded, and no subsequent mistake can deprive him of its operation as a recorded instrument.

THE FILING OF A DEED FOR RECORD IS not annulled by its subsequent unauthorized withdrawal before it is actually recorded.

DEED—RECORDING—FAILURE TO PAY FEES FOR IN ADVANCE.—If a county recorder is not required to demand his fees in advance, and he receives and files for record a deed without demanding such fees, it must be treated, so far as validity of the record is concerned, as if such fees had been paid.

NOTICE—PURCHASER WHERE THE SAME GRANTOR HAS MADE TWO CONVEYANCES AT DIFFERENT PERIODS, BOTH OF WHICH ARE OF RECORD.—A purchaser is bound to examine the records to discover whether the grantor therein had made any conveyance prior in point of time, but junior in record to that under which he claims.

NOTICE.—WHERE THE SAME GRANTOR HAS MADE TWO CONVEYANCES of the same property, both of which are recorded, but the one last made was first recorded, a purchaser

from the grantee in the deed junior in point of execution, but prior in recordation, is chargeable with notice of both conveyances, and must inquire whether he whose conveyance was first recorded was a purchaser in good faith and for a valuable consideration.

PURCHASER—PRESUMPTION OF GOOD FAITH.—Where two conveyances have been made of the same property by the same grantor, and the one last executed was first recorded, it will be presumed that the grantee therein purchased in good faith, for valuable consideration, and without notice of the prior unrecorded conveyance.

Gamble & Dillon, for the appellants.

Robert B. Tripp, for the respondents.

278 HANEY, J. This action is to foreclose a real estate mortgage executed by the defendants Mahany and wife. Defendant Anna Wright claims to own the realty under a conveyance executed and recorded prior to the execution and recording of plaintiff's mortgage, and that the mortgage was executed while she was in the sole, exclusive, and notorious possession and occupation of the premises. The action was tried by a referee, whose decision was accepted by the court, and judgment rendered in favor of defendant Anna Wright. A motion for a new trial having been denied, plaintiffs appeal from the judgment.

The motion for a new trial having been made after judgment, and not having been appealed from, the insufficiency of the evidence to justify the referee's findings of fact cannot be reviewed, and the only question demanding attention is whether such findings sustain the judgment: *Gade v. Collins*, 8 S. Dak. 322; *Bourne v. Johnson*, 10 S. Dak. 36; *Aultman v. Becker*, 10 S. Dak. 58; *Hawkins v. Hubbard*, 2 S. Dak. 631; *Barnard etc. Mfg. Co. v. Galloway*, 5 S. Dak. 205.

The referee finds: That the plaintiffs' mortgage was executed April 15, and recorded April 19, 1887. That on the last-mentioned date defendant Amos E. Mahany submitted to the **279** agents of the mortgagees an abstract of said premises, showing transfers and liens of record, as affecting the title to said premises, which abstract was duly certified to by the said register of deeds on said abstract, and also by the clerk of said court and by the county treasurer of said county, and that said abstract was submitted, and showed of record a final receiver's receipt to William C. Reeves, recorded July 18, 1881; a warranty deed from said William C. Reeves and wife to M. T. Reeves, dated December 4, 1882, acknowledged December 4, 1882, and recorded December 30, 1882; a warranty deed from Ma-

nasseh T. Reeves and wife to Alpha H. Wright, dated April 28, 1883, acknowledged April 28, 1883, and recorded April 30, 1883; a warranty deed from Alpha H. Wright to the defendant Anna P. Wright, dated November 5, 1883, acknowledged November 5, 1883, and recorded March 14, 1884; a warranty deed from Anna P. Wright and husband to the defendant A. E. Mahany, dated March 2, 1885, acknowledged March 2, 1885, and recorded April 7, 1885; a warranty deed from Amos E. Mahany and wife to Butler Cunningham, dated July 22, 1885, acknowledged July 22, 1885, and recorded August 26, 1885; a warranty deed from Butler Cunningham to the defendant A. E. Mahany, dated April 2, 1887, acknowledged April 2, 1887, and recorded April 11, 1887. That the said mortgagees, through their said agents, on or about the twenty-third day of April, 1887, paid to the said defendant Amos E. Mahany, one of the makers of said note and mortgage, the full sum of one thousand dollars. The said payment was made after an abstract of the title of the premises described in said mortgage had been duly made, and an examination thereof, showing that the said mortgage was the first and only lien upon said premises. And the said mortgagees, at the time of making the said loan and paying said money, relied upon said application and the abstract aforesaid; and they had no actual notice, nor did their said agents have any actual notice, of the deed of Butler B. Cunningham to Anna Wright, dated August 14, 1885. That Butler B. Cunningham on the ²⁸⁰fourteenth day of August, 1885, executed and delivered a warranty deed to the defendant Anna Wright, whereby he conveyed to her the premises described in plaintiff's complaint, which deed was duly acknowledged and certified on said date, so as to entitle the same to be recorded; and the said Anna Wright, through one R. B. Tripp, on the fourteenth day of April, 1887, forwarded the said deed, by the usual and ordinary course of mail, sealed, and addressed to the register of deeds at Olivet, Hutchinson county, South Dakota, with the following letter:

"April 14th, 1887.

"F. J. Eisenmann, Recorder, Olivet, D. T.:

"Dear Sir: Herewith I send you two deeds—Sanford McKeever to Anna Wright, and Butler B. Cunningham to Anna P. Wright. Please record them, and return the same to me, with statement of your fees, and I will remit to you.

"Yours truly,

"R. B. TRIPP."

And the said deed was received, together with said letter, and said deed was actually filed for record in said office by the said register of deeds, on the fourteenth day of April, 1887; but the said filing was afterward erased by said register or his deputy. That the said Tripp on or about the seventh day of April, 1887, without the knowledge or consent of, and without authority from, the said Anna Wright (but under circumstances excusing said act), wrote and caused to be forwarded to the said register of deeds a letter directing the said register of deeds, if the said deed from Cunningham to Wright had not been filed or recorded, to withhold the same till further order. That the said deed remained in the office of the register of deeds until on or about the ninth day of May, 1887, when the same was transmitted by the said register of deeds to the said Tripp, and that on or about the fourth day of June, 1887, the said deed was again forwarded by the said Tripp to the said register of deeds for record, and the same was on the fourth day of June, 1887, at 9 o'clock A. M., recorded in the office of the register of deeds of Hutchinson county, and that said deed was so indorsed as registered on said date by the said register of deeds. He also finds "that there was no proof offered at the trial of this action ²⁸¹ that any consideration was paid by the said defendant Anna Wright to Butler B. Cunningham for said deed, other than an acknowledgment contained therein by the grantor of a consideration of eight hundred dollars to him in hand paid, the receipt of which was thereby acknowledged; that the said defendant Anna Wright, or the said Tripp, at the time of the transmission of said deed from Cunningham to Wright, on or about the 14th of August, 1887, or anyone else for her, did not pay, or offer to pay, or tender payment, to the register of deeds his fees for the record of the deed in question."

In this state, "every conveyance of real property other than a lease for a term not exceeding one year is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded": Comp. Laws, sec. 3293. "An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified, it is deposited in the register's office with the proper officer, for record": Comp. Laws, sec. 3272. Under statutes which make the instrument operative as a record from the time it is filed

for record, the better rule seems to be that the grantee should be regarded as having discharged his entire duty when he has delivered his instrument, properly executed and acknowledged, or proved and certified, to the recording officer, and as being in the same attitude as if the instrument were at that moment correctly spread upon the record book, and that no subsequent mistake can deprive it of its operation as a recorded instrument: 2 Jones on Real Property, sec. 1472. It appears from the referee's findings of fact that respondent's deed was so delivered to the register, prior to the execution of plaintiff's mortgage, that it was actually on deposit in the register's office at that time, and that the failure to note it upon the abstract upon which plaintiffs relied was caused by the mistake of either the register or attorney who transmitted it. The direction²⁸² to return the deed having been made without authority, and without the grantee's knowledge or consent, she was not affected thereby. That it was subsequently returned to the register, and spread upon the records, does not change its status at the time the mortgage was executed. It is evident that the grantee did not know of its withdrawal until after the mortgage was recorded. The rights of the mortgagees were fixed by, and dependent upon, the condition of the record when the mortgage was given, and such rights could not be affected by any subsequent recording of the instrument. The second delivery to the register could only affect subsequent transactions, and, to protect herself against such, it was the grantee's duty to again deliver the deed for record when she learned that it had not been spread upon the records. Prior to January 1, 1889, registers were entitled to demand their fees in advance, and were not required to pay any of them over to the county. Since then they have been entitled to demand them in advance, and have been required to account to the county for all except those for making and certifying to abstracts: Comp. Laws, secs. 624, 1436; Laws 1887, c. 50. "Anyone may waive the advantages of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement": Comp. Laws, sec. 4700. When respondent's deed was first deposited with the register, he was at liberty to waive payment of fees, and, having done so, as clearly appears from the facts found by the referee, it became his duty to record the instrument: People v. Bristol, 35 Mich. 28. It follows that, for the purpose of this appeal, respondent's deed must be regarded as if actually spread upon the records when first deposited with

the register of deeds. The effect upon the register's duty of a failure to advance recording fees, under the statute as it has stood since January 1, 1889, is not involved herein, and is not decided.

Regarding respondent's deed as recorded when first deposited with the register, it will be observed that when plaintiff's ²⁸³ mortgage was executed the records disclosed a warranty deed from Cunningham to respondent, executed August 14, 1885, recorded April 14, 1887, and a warranty deed from Cunningham to the mortgagor, executed April 2, 1887, recorded April 11, 1887. Plaintiffs are purchasers in good faith for a valuable consideration, without actual notice of respondent's conveyance and without actual notice that her deed was recorded when their mortgage was taken. Does the law impute notice of such conveyance, and what is the effect of such notice upon the mortgagee, in good faith, and for a valuable consideration, of a grantee in a second deed, recorded before the first deed, when the first deed is recorded before the mortgage is taken? In Massachusetts and Vermont, it is held that a purchaser is not bound to examine the record, after the date of a recorded conveyance, to discover whether the grantor therein has made another, prior in time, but junior in record, but may safely purchase from the grantee in the first recorded conveyance, if he (the purchaser) has not had actual notice of the prior deed, and no notice of facts which make it his duty to prosecute inquiry: *Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 406; 8 Am. Dec. 144; *Morse v. Curtis*, 140 Mass. 112; 54 Am. Rep. 456; *Day v. Clark*, 25 Vt. 397. The doctrine of the Vermont decision was approved by the supreme court of Wisconsin in *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436. But that case was subsequently expressly overruled in a case several times argued before the supreme court of that state, and finally decided in an opinion by Chief Justice Dixon, wherein the difference between the Massachusetts and Wisconsin statutes is pointed out, and the subject exhaustively discussed in the clear and convincing style of that distinguished jurist: *Fallass v. Pierce*, 30 Wis. 443. See, also, *Erwin v. Lewis*, 32 Wis. 276. It would seem the statute construed in *Fallass v. Pierce*, 30 Wis. 443, was substantially the same as that involved in the case at bar. For this reason, and because of the unusually careful manner in which the matter was argued and considered, we think the decision in that case entitled to ²⁸⁴ much weight. Supposing A, the owner, conveys land to B, and afterward conveys the same

land to C, who records his deed before that to B is recorded, and B records his deed before the land is purchased from C, the court therein, speaking by Chief Justice Dixon, uses this language: "Now, the reason why the purchaser from C, in the case above supposed, who buys after the recording of the prior deed to B from A, also the grantor of C, is bound to take notice of B's deed, or of the fact that the true title is or may be in B, is that such purchaser, in looking upon the statute, sees that B's prior and paramount title at common law is not to be divested, or his deed avoided, except upon the happening of three distinct events or contingencies, the absence of either of which will save the title of B, or prove fatal to that claimed by C, or which may be acquired by a purchaser from him. Those events or contingencies are: 1. Good faith in C, or the purchase by him, without notice, of the previous conveyance to B; 2. The payment of a valuable consideration by C; and 3. The first recording of C's deed. The purchaser from C, looking upon the record, sees: 1. The prior conveyance from A to B; and 2. The first recording of C's deed. Of these two facts the record informs him, but of the other two facts requisite, under the statute, to constitute valid title in C as against the prior purchaser, B, the record gives him no information. For knowledge of the other two facts, namely, the good faith of C, and valuable consideration paid by him, the purchaser from, or anyone claiming title under C, as against B or his grantees, must inquire elsewhere than by the record, and is bound, at the peril of his title, or of any right which can be granted by or claimed under C, to ascertain the existence of those facts." This question recently received the careful attention of the supreme court of Mississippi. In an opinion by Chief Justice Cooper, the Massachusetts rule is thoroughly discussed, the authorities in support and those in opposition to it are cited, and the court concludes that the better reason and ²⁸⁵ decided weight of authority are opposed to the Massachusetts view: *Woods v. Garnett*, 72 Miss. 78. We concur in this conclusion. It is supported by the following cases: *Van Renssellaer v. Clark*, 17 Wend. 25; 31 Am. Dec. 280; *Van Aken v. Gleason*, 34 Mich. 477; *English v. Waples*, 13 Iowa, 57; *Mahoney v. Middleton*, 41 Cal. 41. The record of respondent's deed was sufficient to put the mortgagees upon inquiry as to whether Mahany was a purchaser in good faith, and for a valuable consideration. After the recording of her deed the mortgagees parted with the consideration of their mortgage at their peril. If Mahany purchased in good faith, and for a valuable

consideration, he was the owner of the land, and the lien of plaintiff's mortgage is superior to the claims of respondent. If he did not so purchase the property, he had no title whatever, and respondent's rights are paramount to those of the mortgagees: *Erwin v. Lewis*, 32 Wis. 276.

In his findings of fact, the referee states in detail certain acts of the respondent's husband in connection with the property, and concludes, as matters of law, "that the said defendant Anna Wright, or her husband, Alpha H. Wright, at and prior to the date of the execution of the mortgage in suit, was not in possession of the land described in the complaint, and any and all acts and claim of possession by the defendant Anna Wright or her husband, Alpha H. Wright, were insufficient to give the plaintiffs or their assignors any notice of said defendants' title or interest in and to the land in question." Whether or not the respondent was in sole, exclusive, and notorious possession and occupation of the premises, is, we think, a question of fact not found in favor of the respondent, and therefore the judgment in her favor cannot be sustained unless the recording of her deed prior to the execution of plaintiff's mortgage protects her title. Whether or not Mahany purchased in good faith, and for a valuable consideration, is not determined by the findings. In the absence of any finding on this issue, the presumption is that he did so purchase the premises, and the court below erred in concluding ²⁸⁶ that the plaintiffs acquired no interest in or lien upon the mortgaged premises: *Hendrickson v. Woolley*, 39 N. J. Eq. 307; *Sheffey v. Bank*, 33 Fed. Rep. 315. The judgment is reversed, and the cause remanded for further proceedings according to law.

DEEDS—WHEN DEEMED RECORDED—FILING FOR RECORD.—Under a statute providing that every deed entitled to be recorded shall be recorded as of the time when it was delivered to the clerk for that purpose, and shall be considered recorded from the time of such delivery, it is conclusive as to all subsequent purchasers and mortgagees whether actually recorded or not: *Deming v. Miles*, 35 Neb. 739; 37 Am. St. Rep. 464. See *Davis v. Whitaker*, 114 N. C. 279; 41 Am. St. Rep. 793. The subsequent negligence or misconduct of the registrar cannot prejudice the rights of one who has filed his deed for record: *Turman v. Bell*, 54 Ark. 273; 26 Am. St. Rep. 35; as where he delays recording a deed because he does not know who will pay his fees: *Throckmorton v. Price*, 28 Tex. 606; 91 Am. Dec. 334; *Knight v. Whitman*, 6 Bush, 51; 99 Am. Dec. 652. If a deed be withdrawn after it is filed in a proper office for record, before it is in fact copied upon the book of records, its operation as notice of a conveyance is postponed until it is returned: *Johnson v. Burden*, 40 Vt. 567; 94 Am. Dec. 436.

DEEDS—REGISTRATION—NOTICE TO PURCHASERS.—If a purchaser of land has knowledge of any fact sufficient to put him

on inquiry as to the existence of some right or title in conflict with that he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered as a bona fide purchaser: *Anderson v. Blood*, 152 N. Y. 285; 57 Am. St. Rep. 515, and note. Two conveyances from the same grantor being on record for the same land, all purchasers are chargeable with constructive notice of each deed from the time it was filed for record: *Van Rensselaer v. Clark*, 17 Wend. 25; 31 Am. Dec. 280; though, in general, the deed first recorded prevails over an elder deed subsequently recorded, where it appears to have been the intention of both deeds to convey the same land: *McConnel v. Reed*, 4 Scam. 117; 38 Am. Dec. 124. See monographic note to *Green v. Garrington*, 91 Am. Dec. 106-110, on defects in the registration of deeds and their effect. As to the presumption that a subsequent purchaser is a bona fide purchaser, see extended note to *Anthony v. Wheeler*, 17 Am. St. Rep. 288-290.

McPHERSON v. FARGO.

[10 SOUTH DAKOTA, 611.]

CONSIDERATION—PAYMENT OF—WHEN CANNOT BE DISPUTED.—If the payment of a consideration is recited in a contract, the parties are estopped from disputing such payment for the purpose of destroying the effect and operation of the contract.

PRACTICE—QUESTION OF LAW, WHAT IS.—Whether the parties assented to a contract is a question of law when the facts are not disputed.

CONTRACT—SIGNING BY ONE PARTY—WHEN NOT NECESSARY BY THE OTHER.—When an agreement is reduced to writing respecting the purchase and sale of real property executed by the vendor and left with a third person with the understanding that it shall be signed by the purchaser, who thereafter accepts and places it of record, but without signing it, it thereby becomes binding on all of the parties, and the vendor cannot afterward recede therefrom.

STATUTE OF FRAUDS—SIGNATURE BY ONE PARTY ONLY.—Only the party to be charged is required to sign an agreement under the statute of frauds.

SPECIFIC PERFORMANCE—WANT OF MUTUALITY.—It is not necessary to authorize the specific performance of a written agreement that it should be signed by the party seeking to enforce it.

CONTRACT—RIGHT TO WITHDRAW FROM.—Where the terms of a contract are reduced to writing and signed by one of the parties, with the understanding that it shall be signed by the other, the former cannot withdraw from the contract on the ground that the latter has not signed it, unless such signing has been requested and a reasonable time given to comply with the request.

TENDER—WHEN NEED NOT BE MADE.—If one party to a contract notifies the other that he will no longer be bound by it, the latter is excused from making any tender of a sum he is required to pay thereunder.

William R. Steele, for the appellant.

Martin & Mason, for the respondent.

612 CORSON, P. J. This was an action to enforce the specific performance of a contract for the sale of certain real property in the city of Deadwood. The trial was by the court, and judgment was entered for the defendant, and the plaintiffs appealed.

The only errors assigned, discussed by counsel for appellants in his brief, are that the court erred in its conclusions of law and in entering judgment for the defendant, and these are the only errors necessary to be considered on this appeal. The question presented, therefore, is, Should the court, upon its findings of fact, have stated its conclusions of law in favor of the plaintiffs, and entered judgment thereon in their favor?

The material facts found may be briefly stated as follows: On February 8, 1890, and for some days prior thereto, the defendant, Fargo, the owner of the property in controversy, and plaintiff McPherson, had negotiations in reference to a sale of property, and on the last-mentioned day, the terms having been agreed upon, a lawyer was employed to draw up the contract; and on the tenth day of February the contract was signed and acknowledged by said Fargo, "and left in the hands of McPherson, with the understanding on the part of said Fargo and McPherson that the contract should be thereupon signed by the plaintiffs; that the alleged contract was not signed by the plaintiffs at that time, nor until April 7, 1890, and the said contract was not assented to or agreed to by them at the time or until April 7, 1890"; "that on the tenth day of February said instrument was placed upon record by plaintiff McPherson, but without the knowledge or direction of the plaintiff Franklin or defendant Fargo; that on the seventh day of April, 1890, at 1 o'clock P. M., the said instrument was by 613 the plaintiffs, without the knowledge or consent of the defendant, signed and acknowledged, and upon the same day again placed upon record." The court further finds that, on the forenoon of the seventh day of April, the plaintiff McPherson, without the direction or consent of the defendant, placed the sum of six thousand dollars (the amount specified in the contract to be paid) in the First National Bank of Deadwood to the credit of the defendant, and that notice of such deposit was at once mailed to said defendant, who received the same in the afternoon of the same day; that on April 1st the defendant learned that said contract had not been signed by the plaintiffs, and on April 7th, at 12:20 o'clock P. M., he notified the plaintiffs that he would not consent to be longer bound by said contract; that on June 14th the plaintiffs tendered to a clerk in defendant's store, at Dead-

wood, six thousand dollars; that at that time the defendant resided at Hot Springs, Fall River county, and had resided there since June 6th. The court also finds that there was no consideration for said contract. It will thus be seen the contract was executed by defendant on February 10th, and recorded by McPherson on the same day; that, on the forenoon of April 7th, six thousand dollars was deposited to the credit of the defendant, of which he received notice in the afternoon of that day; that at 12:20 P. M. the defendant notified the plaintiffs that he would not longer be bound by the contract, and that at 1 P. M. the plaintiffs executed the contract, and caused the same to be recorded. This action was commenced in July, 1890, but was not argued in this court until January, 1897.

The learned counsel for the appellants contends that, as the contract recites and acknowledges the receipt of a consideration, the defendant is estopped from denying the receipt of such consideration for the purpose of defeating the contract; and the fact of the consideration being so received appearing by the contract made a part of the complaint, which is admitted by the answer, the court's finding was unauthorized, and must be disregarded by this court. We are of the opinion that by ⁶¹⁴ the recital of a consideration, and acknowledgment of the receipt thereof in the contract, the defendant is estopped from denying the payment of the same for the purpose of defeating this action, and the court's finding upon that question must be disregarded by this court. The recital and acknowledgment of the receipt is in the contract made a part of the pleadings. The pleadings, on an appeal from the judgment, are always before the court for review in connection with the findings and judgment. If, therefore, the defendant was estopped from denying the payment of a consideration, the receipt of which is acknowledged in the contract, the court was not authorized to make a finding in conflict with such admission. Mr. Washburn, in his work on Real Property, says: "It is believed that, however the cases may conflict, they all agree, in effect, in this: that it is not competent to prove that no consideration has been paid where one has been acknowledged in the deed, for the purpose of impeaching the validity of the deed, unless it is for the purpose of establishing fraud against the grantor. The true doctrine is stated in *Grout v. Townsend*, 2 Hill, 554, that, where the deed acknowledges the receipt of a consideration, the grantor, and all claiming under him, are estopped from denying that one was paid for the purpose of destroying the effect and operation of

the deed, although they may disprove the payment for the purpose of recovering the consideration money": 3 Washburn on Real Property, 5th ed., 400, 401; McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; Ballard v. Walker, 3 Johns. Cas. 64; Bank of United States v. Housman, 6 Paige Ch. 535; Lawrence v. McCalmont, 2 How. 452.

But in this case the plaintiffs agreed to pay for the property six thousand dollars by the terms of the contract accepted by them, and which by their acceptance, with the provision therein that they "covenant and agree to pay to said party of the first part, his heirs, executors, administrators, and assigns, the further sum of six thousand dollars," became binding upon them, as will more fully appear in the course of this opinion. There was, ^{¶15} therefore, not only a valuable consideration, but full and ample consideration, appearing by the record, which was binding upon the trial court and conclusive in this case.

The counsel for appellants further contend that the question of whether or not the plaintiffs assented to the terms of the contract is one of law, to be determined by the court from the facts found in the case, and that the court's finding that they did not assent to it is purely a legal conclusion, and not the finding of a fact. We are of the opinion that the counsel is correct in this contention. This court is at liberty, therefore, to review the facts found, and determine therefrom whether or not the acts of acceptance on the part of the appellants did constitute in law such an assent as would bind them to perform the covenants and agreements contained in the contract to be by them performed. What, then, was the effect of the acceptance of the contract by McPherson and placing the same upon record? The appellants contend that the plaintiffs thereby became bound by the terms of the contract, and that the failure to execute it on their part does not prevent them from enforcing it as against the defendant. The respondent, on the other hand, insists that, as the agreement was left with McPherson upon the understanding that it should be executed by the plaintiffs, and it not having been executed by them until after the respondent notified them he would not be longer bound by the contract, it never became a binding contract as between them. Conceding the rule to be as stated by respondent, in ordinary contracts, it seems to be well settled that this class of contracts constitutes an exception, and that the acceptance of the contract is, in effect, an agreement on the part of the vendees to perform the stipulations in the contract which they have agreed or covenanted to per-

form. It is clear from the findings in this case that the terms of the sale were agreed upon between McPherson and Fargo, and the contract embodied these terms, and was satisfactory to them. That being so, the agreement, when executed and left with McPherson, ^{¶16} and accepted by him and placed on record, bound Fargo and the plaintiffs—Fargo, for the reason that he had executed it and did not intend to further exercise control over it, and the plaintiffs, because in law they accepted it by placing it upon record. The omission of the plaintiffs to execute it, whether by inadvertence or otherwise, would not relieve them from their liability under the agreement: *Grove v. Hodges*, 55 Pa. St. 504; *Swisshelm v. Swissvale Laundry Co.*, 95 Pa. St. 370; *Sylvester v. Born*, 132 Pa. St. 467; *Western R. Corp. v. Babcock*, 6 Met. 356; *Harlan v. Logansport Nat. Gas Co.*, 133 Ind. 323; *Midland Ry. Co. v. Fisher*, 125 Ind. 19; 21 Am. St. Rep. 189; *Vassault v. Edwards*, 43 Cal. 465; *Vilas v. Dickenson*, 13 Wis. 488; *Lowber v. Connit*, 36 Wis. 182; *Gale v. Nixon*, 6 Cow. 445; *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47.

The counsel in his brief says, and we think correctly, that “the proposition that the purchaser becomes bound to pay the purchase price, by an acceptance of the deed or contract, results from the fact that there is no requirement of law that his agreement shall be in writing. His parol promise to pay binds him. It is only the party to be charged who must sign to satisfy the requirements of the statute of frauds. At common law, a parol agreement for the sale of lands was sufficient to bind both parties, until the enactment of the statute of Charles II, for the prevention of frauds and perjuries, which required that some note or memorandum of the agreement should be in writing, signed by the party to be charged, or his agent thereunto authorized. Our own statute provides that ‘all contracts may be oral, except such as are specially required by statute to be in writing’”: *Comp. Laws*, sec. 3542. But, if the foregoing view is not correct, in this state only the party to be charged is required to sign the agreement under our statute of frauds. Section 3617 of the *Compiled Laws* reads as follows: “No agreement for the sale of real property, or of an interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, ^{¶17} or his agent thereunto authorized in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof.”

And the same rule is applied to cases of specific performance

by section 4630, which reads as follows: "A party who has signed a written contract may be compelled specifically to perform it, though the other has not signed it, if the latter has performed, or offers to perform, it on his part, and the case is otherwise proper for enforcing specific performance." Section 3617 is substantially a copy of the English statute of frauds known as the statute of Charles II, which has been re-enacted by most of the states of the Union. In speaking of this statute, Mr. Pomeroy, in his work on Contracts, section 75, says: "From the language of the provision that the agreement or memorandum thereof shall be signed by the party to be charged therewith, the rule is settled in England, and has been generally followed in this country, that, so far as the statute of frauds affects the contract, a signing by both parties is not necessary, but it is sufficient if the agreement or memorandum is signed by the party against whom it is enforced." Section 4630 embodies the law as laid down in section 736 a of 1 Story's Equity Jurisprudence. The section reads as follows: "But it is not necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it. If the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient. The want of mutuality in the signature merely is no objection to its enforcement." The author of that work cites *Woodward v. Aspinwall*, 3 Sand. 272; *In re Hunter* 1 Edw. Ch. 1; *M'Crea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103; *Clason v. Bailey*, 14 Johns. 484; and the same cases are referred to by the commissioners of the proposed New York Code of Civil Procedure, section 1891, from which our section 4630 is copied: *Moses v. McClain*, 82 Ala. 370; *Welch v. Whelpley*, 62 Mich. 15; 4 Am. St. Rep. 810; *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; ⁶¹⁸ *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Smith & Fleek's Appeal*, 69 Pa. St. 480; *Robinson v. Cheney*, 17 Neb. 679; *Miller v. Cameron*, 45 N. J. Eq. 95; *Old Colony R. R. Co. v. Evans*, 6 Gray, 32; 66 Am. Dec. 394; *Ives v. Hazard*, 67 Am. Dec. 502; *Davis v. Robert*, 89 Ala. 402; 18 Am. St. Rep. 126.

As before stated, the law, as applied to cases arising under the statute of frauds and under the law of this state relating to specific performance, constitutes an exception to the general rule that there must be mutuality in contracts, and that such mutuality is an indispensable requisite to the granting of relief: *Willard's Equity Jurisprudence*, 268. The cases cited by respondent are cases enunciating the general rule, and have no applica-

tion to this case, which, under our code and the decisions, comes clearly within the exception to the general rule. Judge Willard, in his work above referred to (page 268) says: "The only exception to the rule with respect to mutuality is when the agreement, under the statute of frauds, has only been executed by the party sought to be charged. In this class of cases, although the plaintiff has not signed the agreement, . . . yet he can enforce it against the other party by whom it has been executed. This seems to be well settled by the English and American cases." In the case at bar, however, we are of the opinion that the contract could have been enforced against the plaintiffs. It was not an ordinary optional or unilateral contract, but the plaintiffs expressly covenanted and agreed to pay the respondent six thousand dollars and pay certain taxes on or before a specified day. They accepted the contract, and placed it upon record, and they therefore became bound to perform the contract according to its express terms. When, therefore, the contract was signed and acknowledged by the respondent, and left with Mr. McPherson with the understanding that he and Franklin should execute it, their failure to execute it did not release the respondent from his agreement. The acts of respondent did not constitute a mere proposal on his part, but constituted a binding contract on his part as soon as accepted and placed on ⁶¹⁹ record by McPherson, who may, in the absence of any finding to the contrary, be presumed to be acting for himself and co-appellant, Franklin. The terms of the contract had all been agreed to, and, so far as the record discloses, the terms were fair and just, and understood by both parties. The court does not find that there was an agreement that the contract was to be signed by appellants, but only that it was understood between them that the contract was to be signed by appellants. Assuming that that was the understanding, no time was fixed within which the contract was to be executed by appellants, and before the respondent could withdraw from his agreement, if he had the right to withdraw, he would be required to request them to execute the agreement, and give them a reasonable time in which to comply with the request. This would seem to be a reasonable rule, and is sustained by authority: Pomeroy's Specific Performance of Contracts, note p. 111. As will have been observed, no request of that kind was made by the defendant.

The respondent further contends that there was no sufficient tender of the six thousand dollars. But under the finding that defendant, on April 7th, notified the plaintiffs that he would no

longer be bound by the contract, which notice was never recalled, no tender was required on the part of the plaintiffs: Comp. Laws, secs. 3443, 3469, 3474, 3482. It is not necessary, therefore, for us to decide in this case whether or not the tender was sufficient, or as to the effect of the deposit in the First National Bank on the morning of April 7th.

From these views, it follows that the court erred in its conclusions of law and that the judgment is erroneous. The judgment of the circuit court is reversed, and that court is directed to enter judgment in favor of the plaintiffs, and against the defendant, for a specific performance of the contract set out in the complaint, in conformity with the opinion of this court.

CONTRACTS—ACTIONS UPON—DISPUTING CONSIDERATION.—Adequacy of consideration in point of value is not essential to the validity of a promise: *Hind v. Holdship*, 2 Watts, 104; 26 Am. Dec. 107. In absence of fraud, it is presumed to have been determined by parties to a contract if they are capable of contracting: *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348. See note to *Le Blanc v. Butler*, 13 Am. Dec. 378, 379.

CONTRACTS—STATUTE OF FRAUDS—SIGNING BY ONE PARTY.—The statute of frauds is satisfied by a writing signed by the party to be charged, though not signed by the other party: *Old Colony R. R. Co. v. Evans*, 6 Gray, 25; 66 Am. Dec. 394. A contract signed by the vendor alone may be enforced by the vendee who accepts it: *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330, and note collecting cases.

SPECIFIC PERFORMANCE—MUTUALITY.—A promise lacking mutuality at its inception becomes binding on the promisor after performance by the promisee: *Willets v. Sun Mut. Ins. Co.*, 45 N. Y. 45; 6 Am. Rep. 31. The weight of authority does not require that mutuality in a contract shall exist during all its stages: See monographic note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 113. Though to sustain a decree of specific performance of a contract it is generally essential that each of the parties should have the right to compel the other to perform it: Note to *Jones v. Williams*, 61 Am. St. Rep. 459; this is not true without exception: *Hickey v. Dole*, 66 N. H. 336; 49 Am. St. Rep. 614. Courts differ as to this question however: Note to *South etc. R. R. Co. v. Highland Ave. etc. R. R. Co.*, 39 Am. St. Rep. 82; *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; extended note to *Benedict v. Lynch*, 7 Am. Dec. 492-494.

TENDER—WHEN UNNECESSARY.—A tender of a conveyance is unnecessary where the other party has declared his unwillingness to accept it: *Lynch v. Postelthwaite*, 7 Mart. 69; 12 Am. Dec. 495. See monographic note to *Moynahan v. Moore*, 77 Am. Dec. 486-488.

BROWN v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[10 SOUTH DAKOTA, 633]

APPEAL.—UNDERTAKING ON CANNOT BE WAIVED.—The giving of an undertaking on appeal is jurisdictional and cannot be waived by the respondent, unless the statute authorizes such waiver.

Robert B. Tripp, for the appellant.

Wellington Brown, for the respondent.

633 **CORSON, P. J.** This is an appeal from the judgment of the circuit court dismissing an appeal taken from a judgment rendered by a justice of the peace. The plaintiff and respondent moved the circuit court to dismiss the appeal on several grounds, the principal one being that the appellant filed no undertaking on appeal. The motion was resisted upon the ground that an undertaking on appeal was waived by the respondent by his counsel, who signed the following indorsement upon the appeal: "Due service admitted this 25th day of January, 1897, and undertaking for costs and stay pending appeal is hereby waived." The counsel for appellant in this court contends that by the provisions of section 4700 of the Compiled Laws, an undertaking on appeal from justice's court may be waived. That section **634** is as follows: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." We are unable to agree with counsel in his contention. The filing of an undertaking on appeal is required, not only for the benefit of the adverse party, but on grounds of public policy, and for public reasons, and constitutes one of the essential steps in perfecting an appeal. "An appeal from a justice's court is not effectual for any purpose unless an undertaking be filed": Comp. Laws, sec. 6133. This court has held in several cases that the giving of an undertaking is jurisdictional, and that the appellate court acquires no jurisdiction over the case until the undertaking is filed: *Rudolph v. Herman*, 2 S. Dak. 399; *McDonald v. Paris*, 9 S. Dak. 310; *Smith v. Coffin*, 9 S. Dak. 502; *Bonnell v. Van Cise*, 8 S. Dak. 592. In the latter case, the court held that by the express provisions of the code an undertaking might be waived on an appeal from the circuit court to this court. The learned counsel for the appellant contends that the provisions as to waiver of undertakings on appeals from the circuit court should be held applicable to appeals to a justice's court. We cannot agree with counsel in this contention. The law permitting a waiver of the undertaking on appeals from the circuit court was enacted in 1887, and by its express terms is made applicable to appeals under the provisions of that act: Laws 1887, c. 20, sec. 5. The law governing appeals from the justice's court is found in the Revised Codes of 1877, and was not amended by the act of 1887. We

cannot hold, therefore, that the legislature intended that the act of 1887, expressly made applicable to appeals from the higher courts, should also be applicable to appeals from justices' courts. The undertaking, therefore, being essential, in order to confer jurisdiction upon the appellate court, cannot be waived by the parties, in the absence of any statutory provision authorizing such a waiver. This seems to be the view of the supreme court ⁶³⁵ of Massachusetts in construing a similar statute. In *Santom v. Ballard*, 133 Mass. 464, that court says: "The case before us was brought in the central district court of Worcester, which rendered judgment against the plaintiff. He claimed an appeal, but did not file the bond as required by law. The superior court, therefore, had no jurisdiction of the case, and might dismiss it on its own motion, or on the motion of the appellee, at any time before judgment. In many cases where there has been no objection to the jurisdiction because of some irregularity or defect in the service, or some merely technical defect in the process, it has been held that a general appearance by the defendant is a waiver of such objection. But this rule applies only in cases where the court has jurisdiction of the subject-matter. Consent of parties may, in a certain sense, give jurisdiction of the person, but it cannot create jurisdiction over the cause and subject matter, which is not vested in the court by law. . . . The provisions of law requiring a bond are not wholly for the benefit of the appellee, but partly upon considerations of public policy, to discourage frivolous and vexatious litigation. Parties cannot, by their consent, dispense with the bond, and thus, without complying with the law, divest the inferior court of its jurisdiction, and transfer the case to the higher court. It follows that the superior court rightly dismissed the action": *Folsom v. Cornell*, 150 Mass. 121; *Henderson v. Bensen*, 141 Mass. 218; *Ex parte Shethar*, 4 Cow. 540.

It is further contended that this court, in *Erpenbach v. Chicago etc. Ry. Co.*, 8 S. Dak. 575, in effect held that an undertaking on appeal could be waived in such a case; but that question was not considered by the court in that case. There being a number of other questions discussed, this court assumed, for the purposes of the decision of those questions, that the circuit court had jurisdiction. Since that decision this court has had occasion to give the subject of appeals from justices' courts more consideration, and in *Smith v. Coffin*, 9 S. Dak. 502, ⁶³⁶ and *McDonald v. Paris*, 9 S. Dak. 310, has held that an undertaking

on appeal is requisite to give the appellate court jurisdiction of the appeal. Such being the effect of an undertaking, it logically follows that an undertaking, in the absence of an express statute permitting it, cannot be waived by the parties. Our conclusion is, that the circuit court acquired no jurisdiction of the appeal, and that that court properly dismissed the same.

The judgment of the circuit court dismissing the appeal is affirmed.

JURISDICTION—CONFERRED BY CONSENT.—Jurisdiction over the person, but not over the subject-matter of a suit, may be given by consent: *Burnley v. Cook*, 13 Tex. 586; 65 Am. Dec. 79. This is in accord with the rule that the consent of parties cannot confer what is denied by law: *Bent v. Graves*, 8 McCord, 280; 15 Am. Dec. 632; notes to *McQuade v. O'Neill*, 77 Am. Dec. 851; *Roy v. Horsley*, 25 Am. Rep. 539-541.

MORGAN v. BEUTHEIN.

[10 SOUTH DAKOTA, 650.]

A HOMESTEAD IS NOT SUBJECT to a mechanic's lien.

HOMESTEAD.—The grantee of a homestead holds it free from claims which could not be asserted against it when it remained the property of his grantor. Hence, if a homestead is exempt from a mechanic's lien, it does not become subject thereto upon a conveyance thereof being made.

W. J. Hooper, for the appellants.

M. T. Halphide, for the respondents.

650 **CORSON, P. J.** This is an action to foreclose a lien for material furnished for the erection of buildings on property claimed and occupied as a homestead. Judgment for the defendants and the plaintiffs appealed.

The defendant Beuthein filed a separate answer, alleging that the lumber and material for which the plaintiffs sought to enforce a lien were furnished to his codefendant, Lamaack, who was the head of a family, and who claimed, and with his family occupied, the premises as a homestead; that the homestead did not 651 embrace to exceed one hundred and sixty acres in extent, and did not exceed in value five thousand dollars; and that subsequently the said Lamaack sold and conveyed said premises to this defendant. Beuthein demanded judgment that the action be dismissed as to him, and that said claim be declared not to be a lien upon said premises. To this answer the plaintiffs

interposed a demurrer upon the ground that the answer did not state facts sufficient to constitute a defense. The demurrer was overruled, and, the plaintiffs electing to stand on their demurrer, judgment was rendered for Beuthein, dismissing the action as to him. Lamaack did not appear in the action. The only error assigned is, that the court erred in overruling the demurrer.

The plaintiffs contend that the answer was insufficient by reason of the omission of certain technical averments, but this contention is without merit, and we are clearly of the opinion that the answer is sufficient in form. This court held, in *Fallihee v. Wittmayer*, 9 S. Dak. 479, that the homestead is exempt from sale for a mechanic's lien. The learned counsel for plaintiffs challenges the correctness of this decision, but, upon review of that question, we are fully satisfied with the decision, and we do not deem it necessary to further consider that question.

This case presents the further question as to whether or not the grantee of the owner of the homestead holds the property free of any lien for the material so furnished, and used by the owner of the homestead. We are clearly of the opinion that, being exempt while owned and occupied as a homestead by the party ordering the material, it is equally exempt after the sale of the homestead. The decisions are irreconcilably in conflict upon this question, but they depend so largely upon the statutes of the states in which they are made that any attempt to review them would be useless labor.

The plaintiffs contend that the homestead is a personal privilege that continues only so long as the property is used and occupied as a homestead, and that when the party disposes ⁶⁵² of his homestead the lien may be enforced. We cannot concur in this view. The whole theory upon which such an exemption of the homestead is based is opposed to this contention. The manifest object and purpose of the homestead law and its exemption from forced sale is to secure to the family of an improvident debtor a home, and to secure to such debtor and his family, not only the homestead, but the proceeds of the sale of such homestead, for reinvestment in another, as the business and circumstances of the debtor may require. To this end the legislature has made the homestead, as defined and limited by it, absolutely exempt from forced sale, and carefully guarded the right of the debtor when the homestead is of greater value than five thousand dollars, by providing that that sum shall be paid him in case the value exceeds that amount, and exempts such proceeds for a period of one year, to enable him to reinvest it in another

homestead: Laws 1890, c. 86. The legislature has also carefully provided that the homestead, in case of the death of the husband or wife, shall be set apart to the survivor, and, in case of both, then for the children: Comp. Laws, sec. 5778. The statute provides that no judgment shall be a lien upon the homestead: Comp. Laws, sec. 5104. It also provides that the homestead shall be held exempt for any antecedent debt of the parent: Comp. Laws, sec. 2464. It would seem, therefore, that the legislature intended that not only the homestead, while occupied and used as such, should be exempt, but that it shall remain exempt in the possession of the grantee: *Black v. Epperson*, 40 Tex. 187; *Green v. Marks*, 25 Ill. 221; *Alley v. Bay*, 9 Iowa, 509; *Morris v. Ward*, 5 Kan. 239; *Thompson on Homesteads*, sec. 455. In that section Mr. Thompson says: "The general rule, however, is that a debtor may . . . sell his homestead, and deliver possession to his alienee, without subjecting it to his general debts, or to any lien not made specific by valid contract."

Appellant's contend that in the mechanic's lien law there is no exemption of a homestead, and the mechanic or materialman is given a lien upon the land and improvements of the ~~653~~ debtor. This is true, but the various sections of the statute must be construed together, and the exemption law of 1890 was enacted subsequently to the mechanic's lien law, and must prevail when there is any conflict in the provisions of the law. When the mechanic's lien law was enacted, there was no conflict between the provisions of that law and the exemption law, as the homestead at that time was subject to mechanic's liens. The adoption of the state constitution, and the law of 1890, enacted to carry its provisions into effect, effected a radical change in the law: *Fallihee v. Wittmayer*, 9 S. Dak. 479. Our conclusion is, that the property in the possession of the grantee remains exempt, and that the court ruled correctly in overruling the demurrer.

The judgment of the circuit court is affirmed.

HOMESTEAD EXEMPTION—MECHANICS' LIENS.—The homestead exemption being a creature of statute, its extent in different states follows the variations in their homestead laws. In many of them a homestead claim is not exempt from a lien in favor of a mechanic, laborer, or materialman who furnishes labor or materials to be used in the improvement of the homestead: See monographic note to *Mertz v. Berry*, 45 Am. St. Rep. 383; *Bonner v. Minnier*, 13 Mont. 269; 40 Am. St. Rep. 441. In Minnesota, a statute subjecting homesteads to mechanics' liens was declared unconstitutional: *Meyer v. Berlandi*, 39 Minn. 438; 12 Am. St. Rep. 663. See note to *Paulsen v. Manske*, 9 Am. St. Rep. 537, 538.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

NIGHTBERT v. HORNSBY.

[100 TENNESSEE, 82.]

JURY TRIAL—PRESUMPTION AS TO INSTRUCTIONS.—Where the charge of the trial judge is not disclosed by the record, the appellate court will presume the jury was correctly instructed on all questions of law arising upon the evidence in the case.

EXECUTION—LEVY OF—WHEN SUFFICIENT.—If an officer having a writ goes with it to where personal property is and informs the defendant that a levy is made thereon, and the defendant agrees to keep it until the time of the sale, and the officer thereupon indorses upon his writ that he has made a levy, a sufficient levy has been made.

EXECUTION—LEVY OF.—It is not indispensable that an officer charged with the service of an execution should take manual possession of the property levied upon, or should at the moment of the levy indorse his action on the writ. It is sufficient that he goes to the presence of the property with the power and purpose then and there to seize it under a valid execution, and by virtue of such writ assumes control of the property with the knowledge of the defendant, and leaves it in the latter's custody by his consent and with his promise to keep it safely until demanded for sale, notes the fact of the levy on another paper, and subsequently, in due season, makes a proper indorsement on the writ.

EXECUTION LEVY.—THE FAILURE TO TAKE A DELIVERY BOND on leaving with the defendant personal property levied upon under a writ against him does not vitiate the levy.

REPLEVIN.—A JUDGMENT FOR THE PENALTY OF A BOND given in an action of replevin without reference to the value of the property is allowable only after the plaintiff has failed to return the property and a writ of fieri facias has been returned unsatisfied, in whole or in part, and then at the term of the court to which the writ has been returned.

REPLEVIN.—IF THE DEFENDANT RECOVERS IN REPLEVIN, the judgment should be for double the value of the property if not returned, where the suit originated before a justice of the peace, though an appeal is taken to a higher court.

APPELLATE PRACTICE.—The supreme court has power, on appeal, to render such judgment as the trial court should have directed.

Young & Young, for Nighbert.

Welcker & McNutt, for Hornsby.

⁸⁴ CALDWELL, J. Hornsby, as deputy sheriff, was about to sell, under execution, a certain lot of corn belonging to Nighbert, when Nighbert brought this action of replevin to regain possession and prevent the sale. Verdict and judgment were for the defendant, and plaintiff appealed in error.

1. The charge of the court below is not in the record, hence this court will presume that the jury was correctly instructed upon all questions of law arising upon the proof in the case, and need not consider any of the legal propositions urged in the brief of plaintiff's counsel: *Railroad v. House*, 96 Tenn. 552; *Railway Cos. v. Foster*, 88 Tenn. 671; *Jackson Ins. Co. v. Sturges*, 12 Heisk. 339; *Lane v. Keith*, 2 Baxt. 189.

2. The principal and controlling controversy of fact at the trial was whether or not the defendant had made a levy on the corn involved. The verdict ⁸⁵ of the jury is conclusive upon this question if there is any evidence to sustain it, and, in determining whether or not there is such evidence, the strongest legitimate view of the testimony against the plaintiff is, by this court, taken as true: *Railroad v. House*, 96 Tenn. 552; *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 120; *Kirkpatrick v. Jenkins*, 96 Tenn. 85, and cases cited.

The substance of the most cogent evidence against the plaintiff is: 1. The indorsement of a levy in due form upon the back of the execution; 2. The statement of a witness, who was present, that the defendant, having the execution, said to the plaintiff, who pointed out the property, that he would make the levy, and, if indemnified, would advertise and sell; that having said this, he asked the plaintiff if he would be responsible for the property until the day of sale, and received the reply that "it would be there," and that the defendant "noted down on an envelope [the] property he levied on," and went away without "removing the corn or nailing it up"; and 3. That defendant soon indorsed the levy on the execution and notified the plaintiff that he had received an indemnity bond and would advertise and sell the property. These facts are ample to support the verdict, notwithstanding a greater volume of testimony in plaintiff's favor. Undoubtedly, they tend to establish the fact that the defendant actually made a valid levy. More is not needed to sustain the verdict in this court.

⁸⁶ 3. It was not indispensable in law that the officer should

take manual possession of the property, or that he should at the moment of the levy indorse his action upon the execution. It was sufficient if, as indicated by the evidence mentioned, he went into the presence of the property in question with the power and purpose then and there to seize it under a valid execution, and, by virtue of the writ, really assumed control of the property, as upon a manual seizure, with the plaintiff's knowledge, and, having done that, then left the property in the plaintiff's custody by his consent and with his promise to keep it safely until demanded for sale, first noting the fact of the levy upon another paper, and subsequently, in due season, making proper indorsement on the execution itself: Tidd's Practice, 1013; Caruther's History of a Lawsuit, sec. 447, p. 297; Etheridge v. Edwards, 1 Swan, 426; Evans v. Higdon, 1 Baxt. 245; Bradley v. Kesse, 5 Cold. 223; 94 Am. Dec. 246; Brown v. Allen, 3 Head, 429; Tyler v. Dunton, 1 Tenn. Ch. 367, 368; Freeman on Executions, sec. 260.

4. Though the statute authorizes a delivery bond when the property is left by the levying officer in the possession of the execution debtor (Code, sec. 3044; Milliken and Ventree's Code, sec. 3757; Shannon's Code, sec. 4772), and it is always safer and better for the officer to take such a bond, his failure to do so does not affect the validity of the levy: Brown v. Allen, 3 Head, 429. The statute is directory and remedial merely.

5. The jury returned a verdict in favor of defendant, ⁸⁷ and fixed the value of the corn replevied at fifty-two dollars and fifty cents. Upon that verdict the court pronounced judgment in favor of the defendant, and against the plaintiff and the sureties on his replevin bond, for two hundred and fifty dollars, the penalty of the bond, to be satisfied by a return of the corn or the payment of fifty-two dollars and fifty cents, its value. The judgment contained the recital that, unless the corn should be returned, or its value paid within forty days, an execution should issue for the two hundred and fifty dollars.

There are two distinct errors in this judgment. It is erroneous: 1. Because for the penalty of the bond, and 2. Because not for double the value of the property.

Judgment for the penalty of the bond, without reference to the value of the property, is allowable only after the plaintiff has failed to return the property, and a writ of fieri facias has been returned unsatisfied, in whole or in part, and then at the term of the court to which that writ shall have been so returned: Acts 1885, c. 59, sec. 1; Shannon's Code, sec. 5145;

Connor v. Bates, 92 Tenn. 469. This judgment was rendered at the trial term, before the plaintiff had an opportunity to return the property, and before an execution had been issued; hence, it was premature, and unauthorized. The fact that it was stayed, by its own terms, for forty days, did not cure the defect. The statute is summary, and must be strictly pursued.

The suit originated before a justice of the peace, ^{ss} whose judgment, if for the defendant, should, under the law, have been for double the value of the property if not returned: Code, sec. 3397; Milliken and Ventree's Code, sec. 4133; Shannon's Code, sec. 5152. The same law was applicable, on appeal, in the circuit court; consequently, the judgment in the latter court should have been for double the value of the property, to be satisfied by a return of the property: Godsey v. Weatherford, 86 Tenn. 670; Jacobs v. Parker, 7 Baxt. 438.

6. This court has power to render such a judgment as the trial judge should have rendered: Fugate v. Stapleton, 6 Baxt. 321; Alloway v. Nashville, 88 Tenn. 512; Johnson v. Chattanooga, 97 Tenn. 247; and in the exercise of that power it now directs that judgment be entered here as indicated above.

APPEAL—PRESUMPTION AS TO INSTRUCTIONS.—If none of the testimony is incorporated in the case, the supreme court is bound to assume that the instructions given to the jury were applicable to the case made: State v. Levelle, 34 S. C. 120; 27 Am. St. Rep. 709. See Adams v. Vanderbeck, 148 Ind. 92; 62 Am. St. Rep. 497.

EXECUTION—ESSENTIALS OF LEVY.—The levy of a writ is not complete unless the property is actually seized or brought so far under subjection that the officer could exercise control over it. It is not sufficient that he, having the writ, appears at the store wherein the goods of the defendant are, and there announces to him that he has come to levy on everything in the house: Jones v. Howard, 99 Ga. 451; 59 Am. St. Rep. 231, and note. The property must be under the control of the officer; and he must continue in control by remaining present himself, by appointing an agent in his absence, by taking a receipt for the property, or by a seasonable removal of it: Note to Hemmenway v. Wheeler, 25 Am. Dec. 413. A sheriff cannot constitute the debtor his agent to keep the property attached: Gower v. Stevens, 19 Me. 92; 36 Am. Dec. 737. See note to Corniff v. Cook, 51 Am. St. Rep. 61; note to Hollister v. Goodale, 21 Am. Dec. 677-680. Leaving a debtor in possession after levy is considered in England a badge of fraud, but it is not in Pennsylvania, especially with respect to household goods, though it has not been determined how long the debtor may retain them: Note to Butler v. Maynard, 27 Am. Dec. 103.

REPLEVIN BOND—SUIT UPON—MEASURE OF RECOVERY. Defendant in replevin should, upon a replevin bond, recover no more than his legal damages, which depend upon the nature of his right to the property, or the character in which he held it: Pearl v. Garlock, 61 Mich. 419; 1 Am. St. Rep. 603, and note. Com-

pare *Williams v. Vall*, 9 Mich. 162; 80 Am. Dec. 76. A judgment in an action against the sureties on a replevin bond cannot be given for more than the penalty and costs. Interest is not recoverable: *Fraser v. Little*, 13 Mich. 195; 87 Am. Dec. 741, and extended note.

MURRAY v. ALLRED.

[100 TENNESSEE, 100.]

A CONVEYANCE RESERVING TO THE GRANTOR ALL MINES, MINERALS, AND METALS in and under the land does not pass to the grantee any natural gas or coal or petroleum oils constituting a part of such land.

PETROLEUM, OR COAL OIL, IS A MINERAL, and hence does not pass to the grantee under a deed reserving all mines, metals, and minerals.

NATURAL GAS IS A MINERAL, and, therefore, does not pass by a conveyance of land reserving all mines and metals.

POSSESSION, ADVERSE, OF THE SURFACE OF THE SOIL, WHETHER INCLUDES MINERALS.—The possession of the surface of the soil by the owner for the purpose of tillage does not give him any possession of gas or other minerals beneath the surface.

MINERALS.—PRESCRIPTIVE TITLE TO COAL OIL and other minerals beneath the surface of the earth is not acquired by the occupation of the land for tillage under a claim of title.

L. T. Smith and W. T. Murray, for Murray.

James A. Allred, for Allred.

¹⁰⁰ WILKES, J. This cause was decided for defendant by the chancellor, and his decree was reversed ¹⁰¹ by the court of chancery appeals, and the cause is now before us on appeal of defendant and assignment of errors.

The very interesting question is presented whether petroleum oil is a mineral or not. It arises upon the construction of a deed which conveyed certain lands, reserving to the grantor "all mines, minerals, and metals in and under the land." Subsequent conveyances were made to third persons without reservation, and the present owners hold under a deed conveying in fee simple and making no reservation and no reference to "mines, minerals, and metals in and under said land."

The chancellor was of opinion that petroleum was not embraced in the term "minerals." The court of chancery appeals reversed this holding in a very exhaustive, elaborate, learned, and able opinion, and cite the dictionaries, legal and otherwise, the encyclopedias, and many works of science, and a large array of legal authorities holding to the same effect, and they state that, after a most exhaustive search, they have been able to

find but one case holding a contrary doctrine. We can neither elaborate nor improve upon the holding of the court of chancery appeals, and are content to affirm their holding and adopt their opinion as our own.

It is next said that the present owners are protected in their fee simple title to the land by the statute of limitation of seven years. The cause was heard upon an agreed statement of facts, and the ¹⁰² agreement upon this feature of the case is that defendants and those under whom they claim have had the adverse possession of the land for more than seven years. Inasmuch as the complainant's vendor, Rodgers, is one of the parties through whom defendants claim, and the agreed statement of facts does not show how long the land has been held since complainant parted with the title, the facts necessary to sustain the plea are not made out. In addition, it is well settled that one person may own the surface or soil and another the minerals and mines and metals, and even the water, and there may be different owners for the several different strata under the earth. In order to make a holding adverse to one who has reserved or had granted to him the "mines, minerals, and metals," there must appear to have been some denial of his right or assertion of claim inconsistent with his right. This does not necessarily appear when a party uses the land merely for agricultural purposes, a use entirely consistent with the right to mine under the soil by another.

Upon all the points raised we are of opinion the court of chancery appeals is correct, and their decree is affirmed, and the opinion of that court delivered by Judge M. M. Neil, is appended and made the opinion also of this court.

The following is the opinion:

"NEIL, J. The questions in this case arise from the following agreed state of facts:

"We, William T. Murray, as complainant, and ¹⁰³ James A. Allred, as defendant, have a controversy over certain rights in the tract of land hereinafter described, which we desire to settle by an agreed case, made upon the following agreed state of facts, which case we agree to submit to the chancery court at Jamestown for a decision. In this case the following facts are agreed, to wit:

"1. It is agreed that John B. Rodgers, on the twenty-fourth day of October, 1853, sold and conveyed to Mathias Wright a certain tract of land in the thirteenth civil district of Fentress

county, Tennessee, bounded and described as follows [here described], in which deed said John B. Rodgers reserved to himself, his heirs and assigns, all mines, minerals, and metals in and under said land. Said Wright conveyed said land by general warranty deed, without any reservation of said mines, minerals, and metals, and whatever title said deed communicated under the facts hereinafter set out, passed to the defendant, James A. Allred, to the portion claimed by him by regular chain of conveyances from Rodgers, through Wright and others, which purported to convey an estate in fee, except the deed from Rodgers to said Wright, which reserves the mineral interest as above stated. And said Allred and those through whom he claims have been in the actual, open, and notorious possession of said land, under color of title, for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identifies the land intended ¹⁰⁴ to be conveyed, but had not been operating, or intending to operate, in any mining business on said land since the date of the deed from John B. Rodgers to Wright; neither has any of his vendors attempted to mine on said land, or drill for petroleum oil or natural gas. There is no mineral in, under, or on said land, unless petroleum oil or natural gas is held to be such. That petroleum oil had been discovered in White county, Tennessee, and in Wayne county, Kentucky, or Scott county, Tennessee, at what is known as the Martin Beaty well, prior to the deed from John B. Rodgers to Mathias Wright, above referred to. And there are petroleum oil springs in the vicinity of this land, which had been discovered at the date of said deed from Rodgers to Wright.

“2. That said John B. Rodgers, during his life, and his heirs after his death, have claimed said mines and minerals and metals, including petroleum oil and natural gas, until the same passed out of them and passed into William T. Murray by judicial sale, who now owns whatever title they owned in said land before said sale.

“3. The said William T. Murray, by his agent, went onto said portion of the land last mentioned in said Rodgers' deed, claimed by said Allred, and proposed to drill for petroleum oil and natural gas, and was refused the right to do so by said Allred, who conveyed the same to one Lewis Choate, and warranted the title, the said Allred contending that ¹⁰⁵ complainant had no interest in said land: 1. Because the words “mines, minerals, and metals” do not include petroleum oil and natural gas; 2. If

they did, the title of said mines, minerals, and metals has long since been barred by the adverse holding under said deeds.

“‘4. Complainant, Murray, contends that petroleum oil and natural gas are included in the words “mines, minerals, and metals,” and especially so as there is nothing else for the reservation to operate upon, and that the possession of the said Allred and those through whom he claims does not extinguish the title of the said mines, minerals, and metals; 1. Because the facts stated, which are relied upon to effect the bar of the statute of seven years, are not sufficient to establish the character of adverse holding that would effect a bar of his rights or perfect the title of defendants; 2. Because their possession was consistent with the complainant’s title; 3. The said Murray contends that no cause of action would accrue in such case until the adverse holder invaded mineral rights, and that the cultivation of the soil was not such invasion, and therefore no statute of limitations runs as to said reservation.

“‘And it is further agreed that the Hon. T. J. Fisher, chancellor of the fifth chancery division of the state of Tennessee, may pass upon said facts and render such decree as the law and the facts may warrant. The chancellor and the supreme court, in case of appeal, will consult any and all ¹⁰⁶ scientific works and definitions of the words “petroleum oil” and “natural gas,” as well as such legal authorities as are found to aid them in the determination of the question upon the state of facts submitted.’ Proper affidavit was attached.

“Upon this state of facts, the chancellor decreed as follows: That the words ‘mines, minerals, and metals’ did not include oil and gas; also, that there had been seven years’ adverse holding under the deeds purporting to convey an estate in fee, and this vested the defendant with a perfect title in fee, including the title to oil and gas, and that the adverse holding of James A. Allred and those under whom he claimed had extinguished the title of John B. Rodgers, claiming under the adverse reservation as to the mines, minerals, and metals. He thereupon dismissed complainant’s case, and rendered judgment against Murray for the costs. An appeal was prayed and granted, and errors were assigned as follows:

“‘1. The chancellor erred because he did not find, as a matter of law, that the deed from Rodgers to Wright expressly reserved to himself all of the petroleum oil interest in the land conveyed, and that by the subsequent judicial sale Rodgers’ title in the same vested in complainant.

"2. The court erred because he did not hold, as a matter of fact, viz: It not appearing at what time Wright sold the land, and consequently it not appearing how much of the time that the land was ¹⁰⁷ adversely held was by Wright under his deed from Rodgers, which deed made the reservation, therefore, it does not appear, as a fact of record, that the defendant has held possession of the land for seven years next before this suit was brought, under deed purporting to convey the entire estate in the land; this fact not affirmatively appearing, the defense of the statute of limitations must fail.

"3. The court erred because it does not hold that, as a matter of law, the possession of the defendants was consistent with complainant's title, and that, there being a double ownership in the land, no cause of action could accrue in his favor so long as the owner of the surface only exercised his legal rights. The statute of limitations does not begin to run until the mineral rights in the land were invaded.'

"The first question to be determined is whether petroleum oil is included within the language of the reservation of mines, minerals, and metals.

"In the Century Dictionary petroleum is defined: 'An oily substance of great economical importance, especially as a source of light, appearing naturally oozing from crevices in rocks, or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring into the rock; rock-oil.'

"Various opinions have been expressed concerning the origin of petroleum,' says Professor S. F. Peckham, in the American Cyclopaedia. 'Until quite recently ¹⁰⁸ all of these theories were based upon the assumption that it had been derived from vegetable or animal organisms. Some have supposed that it is the product of the decomposition of woody fiber, by which more of the carbon and less of the hydrogen has been evolved by the decomposition which has produced coal. Again, it has been supposed to be the product of the natural distillation of pyrobituminous shales and coals. Lesquereux attributes its origin to the partial decomposition of low forms of marine vegetation. Berthelot has advanced the theory that by the complex chemical changes at present taking place in the interior of the earth, petroleum is continually set free. It may be assumed that petroleum is a normal or primary production of the decomposition of marine or vegetable organisms, chiefly the former, and that nearly all other varieties of bitumen are products of a subsequent decom-

position of petroleum, differing both in kind and degree. The occurrence of petroleum in the lower palaeozoic rocks of Pennsylvania and Canada, which contain no traces of land plants, shows that it has not in all cases been derived from terrestrial vegetation, but may have been formed from marine plants or animals, an opinion further strengthened when we find in the rocks of the tertiary age, in which fossil remains of the higher marine animals occur in abundance, a petroleum comparatively rich in nitrogen.' It is shown, also, in the same authority, that petroleum is procured by a process of mining—that is, ¹⁰⁹ by the sinking of wells. It is said the productive wells vary greatly in depth. In some, large supplies have been afforded at sixty and seventy feet, and in others at greater depths to over one thousand feet. It is said that most of the oil is obtained from wells over one hundred and eighty feet deep; that shallow wells, exhausted by pumping, are successfully made to yield again by sinking them deeper; that the oil is found at several zones or oil producing depths; that the pumps are sunk deeper into the well as the supply goes down. And he continues: 'It is observed that if the pumping is interrupted for a day, the product obtained, when it is renewed, will be water which is more or less salt. At some wells the flow of water has continued during several days' pumping before the oil was recovered. This never seems to fail entirely, unless it be from some obstruction arresting the flow, and then recourse is had to sinking deeper or enlarging the bore of the hole. Salt water commonly comes up with the oil, and is separated from it by standing in the vats into which the products are received. The proportion of this oil is very variable, and the quantity of the oil pumped from a single well is far from being regular. Sometimes the oil, when first struck, rushes up with great violence, by reason of the carburetted hydrogen gas that accompanies it. This produces a spouting or flowing well, from some of which the yield has been more than one thousand barrels a day for a long time; but the ¹¹⁰ quantity gradually diminishes until they cease to be flowing wells, and they are then pumped. In a few instances the oil has leaped forth with such violence as to be beyond control, and immense quantities have been lost. These fountains of oil have sometimes taken fire, producing terrific conflagrations and presenting scenes of appalling grandeur.' "

"Clearly, from this description of the substance, it could not, in any sense, fall under the terms 'metal' or 'metallic.' The ques-

tion then to be determined is: Does it fall within the term 'mines and minerals'?

"In 2 Rapalje and Lawrence's Law Dictionary, 821, it is said: 'In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal ores of all kinds, clay, stone, slate, and caprolites. (Surface means that part of the land which is capable of being used for agricultural purposes; *Midland Ry. Co. v. Checkley*, L. R. 4 Eq. 19; *Hext v. Gill*, L. R. 7 Ch. 669; *Attorney General v. Tomblin*, L. R. 5 Ch. Div. 762.) A mine is a work for the excavation of minerals by means of pits, shafts, levels, tunnels, et cetera, as opposed to a quarry where the whole excavation is open. While unreserved, minerals form part of the land, and as such are real estate. When severed, they become personal chattels.'

"In 15 American and English Encyclopedia of Law, 500, the following ¹¹¹ occurs: 'Mineral originally signified that which is obtained from a mine, from underground mining, as distinguished from that which is quarried. The term is not limited to metallic substances, but includes salt, coal, paint stone and similar substances': Citing on the last point, *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448.

"In that case, the question was, whether the mineral stone paint passed under the terms 'mines and minerals.' Upon this question the court, in that case, says: 'The character of the substance of stone paint, as the witness called it, is given in the bill, and the correctness of the description there given is admitted in the answer and confirmed by the evidence. It is a substance similar in general appearance to red shale, so soft as to be easily cut with a knife when first excavated, but differing in appearance from the surrounding earth. It is found in regular strata or boulders of different sizes. It hardens when exposed to the air, and when broken up and ground, it is used as a paint, and is valuable for that purpose. The manner in which it is procured from the earth, and its particular location below the surface, are particularly described by a witness, who was the foreman in carrying on the works. They commenced working in an old shaft which had been used for raising copper ore. As they proceeded with the excavation, the depth of the paint stone was about one foot in eight or ten, perhaps a little ¹¹² more. At the point of the pit opposite to the side at which the excavation was commenced, the paint stone was from eighteen to twenty feet from the surface of the earth. The work

was carried on by making regular mine shafts of timber, one of which was extended about fifty-six feet in length and penetrated about twelve feet into the mountain beyond the open pit; others were made very similar in character. The stratum of paint stone in the largest pit was found to vary from six to fifteen feet in thickness. The stratum was uniform, increasing in thickness as progress was made into the mountain. It does not crumble, like red shale, but comes off in square pieces. It is ground in a mill, and is fit for use as a paint by mixing it with oil. Its value is from twenty dollars to thirty dollars per ton. Professor Doremus is the only scientific witness examined. He says: "It may be called an argillaceous sandstone, alumina and silica being the prominent ingredients; it is not an ore of iron. This comes under the head of argillaceous rocks. I wish to distinguish these classes from ores or metalliferous rocks. The position of this paint material as it lies in the mountain is not in veins, but is in strata. The extracting of this material, as I saw it there, would not be called mining.' "

" 'The analysis,' the court continues, 'only establishes the fact that it is not a metalliferous ore. If the terms, "mines and minerals," used in the deed, could, by any fair construction, be confined to metallic ¹¹³ substances, the question involved would be of easy solution; for the metallic property found in this paint stone is so small that, for the purpose of extracting the metal, it is of no value. But I do not think the terms should be confined to the metals or metallic ores. I cannot doubt if a strata of salt or even a pit of coal had been found, they would have passed under this grant.

" 'Can this stone paint, then, be fairly and naturally embraced in the term "mineral"? It is a body which is destitute of organism, and which naturally exists within the earth. It is below the surface, distinguished from the ordinary earth. It is in strata, and is acquired by ordinary means of mining. Also, Professor Doremus says that it is not in veins, but in strata, and that he would not call the mode of extracting it mining, yet this test of it would exclude salt from the class of minerals, for salt, too, is found in strata, and not in veins, and is obtained by shafts, and by the same mode of operation by which this matter is excavated from the earth. It is valuable for its mineral properties, and by a cheap and easy process of grinding is converted into a merchantable article adapted to the mechanical and ornamental arts. It is embraced in the definition given by men of science to the term "mineral." In Bakewell's Mineralogy, page

7, it is said: "The term 'mineral' in common life is generally applied to denote substances dug out of the earth or obtained from mining." In Cleveland's Mineralogy, page 1, the ¹¹⁴ definition is given thus: "Minerals are those bodies which are destitute of organism, and which naturally exist within the earth or its surface." My conclusion is, that this paint stone passed by the grant, and that the defendants have the right to excavate and use it, and convert the same to their own use.'

"In a note to the case of Dunham v. Kirkpatric, appearing on page 698 of 47 American Reports, the following appears: 'Freestone is a mineral within a reservation in a deed: Bell v. Wilson, L. R. 1 Ch. 303. Coal oil is a "mineral product": Thompson v. Noble, 8 Pittsb. 201. Petroleum is a "mineral, and a part of the realty": Stoughton's Appeal, 88 Pa. St. 198. Coal is a "mineral": Henry v. Lowe, 73 Mo. 96. In Tucker v. Linger, L. R. 21 Ch. Div. 18, 46 L. T., N. S., 894, it was held that flint stones, turned up by the plow in the course of husbandry, were "minerals" within a reservation to the lessor of "mines and minerals, and quarries of stone, brick-earth and gravel pits." This holding was affirmed by the house of lords: Tucker v. Linge, 8 App. Cas. 508. In Ross v. Waiman, 14 Mees. & W. 859, the court said that the word, "though more frequently applied to substances containing metals, in its proper sense, includes all fossil bodies or matters dug out of mines." And in David v. Roper, 3 Drew. 294, it was restricted to such products as are worked by means of mines. More recently, however, in Hext v. Gill, L. R. 7 Ch. App. 699, the natural meaning of the term was said to be: "Every substance ¹¹⁵ which can be got from underneath the surface of the earth for the purpose of profit." Again, it has been held to include beds of china clay, while, on the other hand, freestone, quarries of limestone and clay and sand, respectively, have been decided not to be "minerals." In In re Dudley's Settled Estates, Ch. Div., it was held that a lease of salt works, where the brine was pumped from the earth and was made into salt, was not a lease of minerals.'

"In the case of Williamson v. Jones, 39 W. Va. 231, the following language is used by Mr. Justice Holt: "The authorities now very generally—universally, so far as I have examined them—hold petroleum to be a mineral, and as much a part of realty as timber, coal, or iron ore, except that, in proper cases, its mobility as a subterranean liquid must be taken into consideration, as in the case of salt water, et cetera. The courts of the

state of Pennsylvania have had many cases, some involving rights of great value, in which the point arose, and have examined the question thoroughly, considering it with great care with reference to its being property where it is found, and its character and nature in general as property.'

" 'Oil is a mineral, and, being a mineral, is a part of the realty': Funk v. Haldeman (1866), 53 Pa. St. 229, 249.

"In the case of Westmoreland etc. Natural Gas Co. v. De Witt, 130 Pa. St. 235, the master said: 'Gas is a mineral, and while ¹¹⁶ in situ is a part of the land, and therefore possession of the land is possession of the gas.' After quoting this, the court said: 'This deduction must be made with some qualifications. Gas, it is true, is a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than the mere decision. Water is also a mineral, but the decisions in ordinary cases of mining, et cetera, have never been used as unqualified precedents in regard to flowing, or even percolating, waters. Water and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract is uncertain, as said by Chief Justice Agnew, in Brown v. Vandergrift, 80 Pa. St. 147, 148. They belong to the owner of the land, and are a part of it so long as they are on or in it, and are subject to his control; but when they escape and go into other lands, or come under another's control, the title of the former owner is gone.'

"We have found only one authority opposed to the conclusion that petroleum is a mineral. That is the case before referred to of Dunham v. Kirkpatrick, 101 Pa. St. 36; 47 Am. Rep. 696. The great weight of authority is not only opposed ¹¹⁷ to that case, but it seems to us to proceed upon false principles. The ground of the decision, as stated in the opinion, is that, by the bulk of mankind, nothing is considered as mineral except such things as be of metallic nature—such as gold, silver, copper, lead, et cetera. That in the popular estimation, petroleum is not regarded as a mineral substance any more than is animal or vegetable oil, and that it could only be classified as such in the most general and scientific sense. So, in the light of this assumed general view of the bulk of mankind, petroleum was held not

to fall within a reservation as to minerals. We think, however, that the true meaning of the word 'mineral,' as well as its meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals. This case seems to be opposed in principle by the later case of *Gill v. Weston*, 110 Pa. St. 313, where petroleum was held to be a mineral substance, in construing the Pennsylvania act of 1855, concerning the mortgaging of terms on mining lands. The court said in that case: 'It is a mineral substance obtained from the earth by the process of mining, and land from which it is obtained may, with propriety, be called mining lands.'

"In the light of these authorities, we are bound to hold that petroleum is a mineral, and that it falls within the terms of the reservation in the deed ¹¹⁸ referred to in the foregoing case. The same is true of natural gas. We are of the opinion that the first assignment of error, therefore, is well taken. We are of the opinion, also, that the second assignment of error is well taken. To resolve the point raised by this assignment of error, we must construe the agreed state of facts. From this state of facts, it appears that Rodgers conveyed the land with the mineral reservation on the twenty-fourth day of October, 1853, to Mathias Wright, and that Wright conveyed the land by general warranty deed, without any reservation, to some third party, and then it passed through a series of conveyances to James A. Allred; but the date of the deed made by Wright is not given, nor the date of any other deed, nor how long Allred held after Wright's deed. It thus does not appear from the agreement that there was seven years' adverse possession from the date of the deed of Mathias Wright. The agreement is, that Allred and those under whom he claims have been in the actual, open, and notorious possession of the land, under color of title, for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be conveyed. Within the expression, 'those under whom he claims,' is not only included Wright, but Rodgers. Therefore, it is impossible to say that there was seven years of adverse possession from the deed made by Wright to the third person forward.

¹¹⁹ "We are of the opinion, also, that the third assignment of error is well taken. In mineral lands the surface, as adapted to cultivation, may be separated from the right to dig under

its surface for ore, and one person may hold one of these rights, while another holds the right of the other: *Stewart v. Chadwick*, 8 Iowa, 463; *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760. So, the possession of the soil by the owner for the purpose of tillage gives him no possession of the gas under the surface, or of the other minerals: *Westmoreland etc. Gas. Co. v. De Witt*, 130 Pa. St. 235; *Chartier's Black Coal Co. v. Mellan*, 152 Pa. St. 286; 34 Am. St. Rep. 645. In this case it is said: "The mining of coal and other minerals is constantly developing new questions. Formerly, a man who owned the surface owned it to the center of the earth; now the surface of the land may be separated from the strata underneath it, and there may be as many different owners as there are strata: *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; 24 Am. St. Rep. 544. . . . In the early days of the common law, the attention of buyers and sellers, and therefore the attention of the court, was based upon the surface proper, and who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended to the clouds and downward to the center of the earth. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income of it was agriculture. The comparatively recent development ¹²⁰ of the science of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have become to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal or iron, or oil or gas, known to underlie them at various depths. These deposits, however, are sometimes found beneath well-cultivated farms, so that the surface has a large market value apart from the value of deposits of coal or iron or other minerals under it. In such cases, the owner is rarely able to utilize the lower strata of wealth to which he has title, and, for this reason, he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for cultivating purposes, precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of encumbrance, levy, and sale, precisely like the surface.' "

The result is, that the decree of the chancellor must be reversed with costs, and a decree entered here affirming the decree of the court of chancery appeals for the complainant in accordance with this opinion.

DEEDS—RESERVATION OF MINERALS.—The word "minerals," within a grant or reservation of mines and minerals, includes not only metals and metal-bearing rock, but anything mineral in character which can be got by mining: *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495; 49 Am. St. Rep. 683, and note. Petroleum oil and natural gas are minerals: *Marshall v. Mellon*, 179 Pa. St. 371; 57 Am. St. Rep. 601, and note. See *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317; 63 Am. St. Rep. 721, and note.

ADVERSE POSSESSION—MINERALS.—Possession of the surface of land for more than twenty-one years does not carry with it the possession of minerals below it, where the title to the latter had been severed from that to the surface by deed: *Caldwell v. Copeland*, 87 Pa. St. 427; 78 Am. Dec. 436, and note; but if there is no severance of coal from the surface, an adverse entry upon the surface extends downward and draws to it title to the underlying minerals: *Delaware etc. Canal Co. v. Hughes*, 183 Pa. St. 66; 63 Am. St. Rep. 743, and note.

RAILROAD v. FRENCH.

[100 TENNESSEE, 209.]

EASEMENT—ADVERSE POSSESSION OF LANDS WHICH ARE SUBJECT TO.—One who holds possession of lands which are subject to the right of way of a railroad cannot acquire prescriptive title as against such railroad, so long as the purposes for which he uses them are not inconsistent with the right of way. The possession cannot be adverse until the railroad needs the property so possessed for railroad purposes.

RAILWAY—RIGHT OF WAY.—Occupancy of its right of way by a railroad corporation for the purposes of a water tank, when necessary, is proper, and the owner of land which is subject to a right of way cannot object thereto.

Dickinson & Walker and Buquo & Rudolph, for the railroad.

Herman Dunbar, for French.

210 WILKES, J. This action was commenced before a justice of the peace to recover damages to a lot lying adjacent to the railroad, in Erin, Houston county. On appeal, the case was heard before the court and jury, and judgment was rendered for one hundred dollars, and the railroad has appealed and assigned errors.

The facts are that the railroad company is entitled to an easement over one hundred feet on each side of the center of its track for right of way under its charter provisions. Plaintiff has bought a lot extending over fifty feet of this right of way,

and has a deed in fee simple to it. His vendor owned several other lots adjacent, and of which this lot was originally a part, and upon the other portions of the original lot had erected several houses, two as early as 1879, and others at subsequent dates. The lot owned by plaintiff had no house or inclosure upon it, but was a part of the original lot on which the houses had been built on the right of way. In 1896, or 1897, the railroad company erected a water tank upon the vacant lot, for railroad use. The court, in substance, charged that if this lot had been adversely held under color of title by plaintiff and his vendors for seven years or more, his title would be perfect to the land to the extent of his paper boundaries, and the railroad would be liable if it trespassed upon this land to build its water tank. The court refused to charge that there must have been actual adverse possession of this particular lot ²¹¹ in a way inconsistent with the easement of the railroad, but said an actual adverse possession of a portion of the lot covered by the original paper title would be sufficient to give title to the extent of the boundaries in the title paper.

There is error in the charge of the court below. It appears from the record that the railroad company, under its charter, has an easement or right of way over one hundred feet on each side of the center of its road, and it has been repeatedly held by this court that a user by an adjacent landowner of the right of way up to the line of the road for an indefinite time is not adverse to the road easement. It may be used for agricultural or any other legitimate and proper purposes. A house may be built upon it and occupied, and it may be inclosed, and the railroad will not lose its easement. The possession for such purposes is consistent with the easement, no matter what kind of a paper title the party in possession may have, and the possession could not be adverse until the railroad may need the premises and demand it for railroad purposes. Occupancy with a house, or inclosure and cultivation and use, are not sufficient to defeat the easement of the road, inasmuch as the road can only demand and take its full right of way when it becomes necessary for railroad purposes, and until then the possession is not adverse. A person who builds upon the right of way of a railroad does so at his peril, no matter what paper title he may have from a ²¹² third person. And all persons are affected with notice of the extent of the right of way when it depends upon the charter provisions. This being so, the railroad company has the right to occupy any portion of this one hundred

foot right of way at any time it is necessary for its purposes as a railroad. A water tank is a species of property necessary for the purposes of a railroad, and there is no question made or proof introduced to show that it was not necessary to erect it at this point. We cannot presume that the road would place the tank there for any other purpose than that of a railroad use. If it was erected there to annoy and harass plaintiff, or for any other than a necessary railroad purpose and convenience, that fact should have been shown by the proof. The principles here announced were laid down in *Railway Co. v. Telford*, 89 Tenn. 295, and have been repeated in a number of cases in which the question has come before the court in various ways.

We are constrained to reverse the judgment of the court below, and remand the cause for a new trial. Costs of appeal will be paid by appellee.

ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.—Continued use of land by a grantor is not evidence that his possession is adverse to his grantee; on the other hand, his possession is presumed to be under or in subordination to the legal title held by his grantee, for he is estopped by his deed from claiming that the holding is adverse: *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740, and note. But an owner of the fee, it has been held, who incloses a railroad right of way with his adjoining lands and uses it continuously without the consent of the company, asserts an ownership inconsistent with its rights, and has such an occupancy as ripens into title by adverse possession upon the expiration of the statutory period, although he has a right during such period to use the right of way for any purpose not required for the purposes of the railroad: *Matthews v. Lake Shore etc. Ry. Co.*, 110 Mich. 170; 64 Am. St. Rep. 336; *Illinois Cent. R. R. Co. v. Houghton*, 128 Ill. 233; 9 Am. St. Rep. 581.

RAILROAD COMPANIES—USE OF RIGHT OF WAY.—A railroad company has a right to exclusive occupancy of land taken for its road, and to exclude concurrent occupancy by the former owners, at any time or for any purpose: *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246; *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265; 1 Am. Rep. 325. See *Brainard v. Clapp*, 10 Cush. 6; 57 Am. Dec. 74, and note.

CITIZENS' RAPID TRANSIT COMPANY v. DEW.

[100 TENNESSEE, 317.]

A STREET RAILWAY SHOULD HAVE sufficient employes on its cars to operate them in a careful manner, so as to prevent injury to persons and animals that may go upon the track, and it is answerable for damages resulting from its failure to do so. It is for the jury to determine from all the circumstances whether the operation of a street-car by one employé only, who must perform the duties both of motorman and of conductor, is negligent.

STREET RAILWAYS.—A DOG ON A STREET RAILWAY TRACK in a public highway is not a trespasser.

THE KILLING OF A DOG BY HIS OWNER, to prevent his suffering after he has been fatally injured through the negligence of a street railway, does not prevent the owner from recovering therefor.

STREET RAILWAYS—DOGS ON THE TRACK.—It is not true that a motorman in charge of a rapidly moving street-car can rely exclusively upon the keen sense of hearing, great alertness, intelligence, and celerity common to dogs when he sees one standing on the track, if, by so doing, he absolves himself from all duty and care to prevent an accident.

DOGS—PROPERTY IN.—The owner of a dog has such property therein as will sustain an action for negligently injuring and killing it.

DOGS—RAILWAYS.—A DOG is an animal such as the statute contemplates in providing statutory precautions when they appear on railway tracks.

A STREET RAILWAY COMPANY IS LIABLE FOR NEGLIGENCE in running a car over a dog standing on its tracks in a public highway.

THE PEDIGREE OF A DOG may be established by common and general reputation and by registries made in certain books, which are shown to be kept for the information of the public and to be commonly received as satisfactory evidence of pedigree.

EVIDENCE OF A DOG'S PEDIGREE and of the qualifications and performances of his ancestors is competent for the purpose of proving his value.

J. S. Pilcher, for Citizens' Rapid Transit Company.

J. D. B. De Bow, for Dew.

318 WILKES, J. This is an action for negligently injuring and killing a dog. It was commenced before a justice of the peace, and, on appeal, was tried in the circuit court, before the court and a jury. There have been two trials, the first resulting in a mistrial, and the second in a verdict and judgment for two hundred and fifty dollars, and defendant, Rapid Transit Company, has appealed and assigned many errors. **319** They are too numerous to treat separately and seriatim. It is said there is no evidence to sustain the verdict. It appears that the Citizens' Rapid Transit Company operates a line of electric street-cars from Nashville to West Nashville, over a highway known as the Charlotte Pike. This pike is a public thoroughfare for wagons and other vehicles, horses, cattle, pedestrians, and is much used and frequented.

The plaintiff was passing over this turnpike, returning from a nutting expedition into the country, in a conveyance with his two daughters. He had taken his gun with him, and also a favorite bird dog. The accident occurred about five o'clock in the evening. The dog was running along the turnpike, or thoroughfare, some one hundred and fifty or two hundred yards in

front of the plaintiff's vehicle, when he started across the tracks of the street-car line, which were laid on the bed of the turnpike, some little birds flying up attracted his attention, and he stopped in the center of the track, and, as some witnesses say, was in the act of "setting" the birds. The term "setting," as used here, has a somewhat technical meaning, and means that he was "standing" and intently looking in one direction. In dog parlance, therefore, "setting" means "standing," and the attitude is also called "pointing." While in this attitude a street-car came up rapidly, and, some of the witnesses say, almost noiselessly, upon him, and ran over and ³²⁰crushed him so much that his owner, seeing that he was fatally injured, shot and killed him. It appears that the gong was not sounded, the motorman did not shout at the dog, did not make any effort to check the car until it was so close that it was impossible to prevent running over the dog. The motorman excuses his act by saying that the dog came upon the track so abruptly and unexpectedly, and so nearly in front of the car, that there was no time to stop the car or sound the gong, or take any other precautions. There is other evidence to show that the dog could be seen, and was seen, quite a distance before the car reached him, and the weight of the evidence is in favor of this view of the case. The car was running rapidly and smoothly at the time, the dog was in plain view upon the track, and, according to some of the witnesses, the motorman was looking at him for some distance, and evidently expecting that he would leave the track in time to escape injury. All other questions out of the way, there is ample evidence to sustain the verdict of the jury as to the killing, the negligence of the motorman, and the reckless running of the cars at a rapid rate of speed, and without due precaution to prevent accidents to animals on the track.

It was not error in the trial judge to charge that the street-car company must have sufficient employes on its cars to operate them in a careful manner, so as to prevent damages or injuries to persons and animals that might go upon the track, ³²¹and was liable for a failure to do so, the question of what number would be sufficient being left to the jury under all the circumstances. It appears that, at this time and place, the motorman was the only employe on the car, and he was doing duty both as motorman and conductor, the latter having left the car after it passed from the more crowded portion of the track nearer the city. The roadway of the street-car company being on the roadway of the turnpike, where persons, horses, and vehicles were

constantly passing, and had the right to pass, and on the same grade as the turnpike, were all circumstances for the jury to consider, and they could properly do so under the charge as given. The motorman had also stated that the reason he did not see the dog sooner was because he was looking around at the passengers to see if any desired to get off, so that the charge was called for and appropriate.

It was not error to charge that, inasmuch as the street-car track was laid on the roadway, and on the same level with it, that the dog was not a trespasser if he went upon the track, inasmuch as the dog was not improperly on the highway.

It was not error to tell the jury that if, after the dog was injured, his master killed him, under the honest belief that he was fatally injured, this would not prevent a recovery. The action in this case was for both the injury and killing, and if the jury should have found that the dog ought not to ~~322~~ have been killed, still the plaintiff would be entitled to damages for his injuries.

It is said that the judge should have told the jury that the motorman might rely upon the keen sense of hearing, great alertness, intelligence, and active celerity common to dogs, and they might consider and weigh their own practical knowledge as to the nature, character, and quality of dogs, and consider all these matters in reaching a verdict in the case. The request we think is too broad; unquestionably, the jury might take into consideration common knowledge and observation about the habits and qualities of dogs, but it was going too far to say that the motorman might rely upon the quickness and celerity of the dog, and thus absolve himself from all duty and care to prevent the accident, which is virtually what the request implies. The court sufficiently stated to the jury the rule applicable, if the dog appeared so suddenly and immediately in front of the car that it could not be stopped, and no precaution could have prevented the accident. The special request on this point was not necessary, nor as made was it correct.

Assignments are made which raise the question of the status of dogs before the law, and on what plane they are to be put, and how regarded. It has been held that the owner of a dog has such property in him as that he may maintain an action for killing or injuring him: *Wheatly v. Harris*, 4 Sneed, 468; 70 Am. Dec. 258. Also, that he is the subject of ~~323~~ larceny as personal property: *State v. Brown*, 9 Baxt. 53; 40 Am. Rep. 81. It has also been held that a dog is an animal such as the statute

contemplates in providing statutory precautions when they appear upon railroad tracks: *Fink v. Evans*, 95 Tenn. 416. It is true, that at common law a dog was not considered as property, the reason given being that they were base in their nature, and kept merely for whims and pleasures. But this rule of law has not found favor in later days, and the reason of the rule is not regarded as well founded.

In *Mullaly v. People*, 86 N. Y. 365, the court said, very enthusiastically, that "when we call to mind the fact that a small spaniel saved the life of William of Orange, and thus changed the current of modern history, and when we consider the faithful St. Bernards, which rescue travelers caught in the storms which sweep over the crests and sides of the Alps, the claim that the dog is base in his nature is overthrown, and he cannot be left a prey to every person who chooses to steal or kill him. The rule of the common law was technical in the extreme, for while it was not larceny by it to steal a dog while living, it was larceny to steal his hide after he was dead."

Large amounts of money are now invested in dogs, and they are extensively the subjects of trade and traffic. They are the negro's associates, and often his only property, the poor man's friend, and the rich man's companion, and the protection of women and ³²⁴ children, hearthstones and henroosts. In the earlier law books it was said that "dog law" was as hard to define as was "dog Latin." But that day has passed, and dogs have now a distinct and well-established status in the eyes of the law.

Much evidence is given in the case upon the question of the dog's pedigree and ancestry. The objections made are, that these matters are attempted to be proven by general reputation, and this is characterized as hearsay. But the question of pedigree and ancestry is a matter of common or general reputation, whether the question concerns horses, cattle, dogs, or men. The matter, from the very nature of things, depends upon reputation or common repute. It is shown that certain books are kept, and in them there is a registration of pedigrees kept up for the information of the public, not only as to horses, but also as to cattle and dogs. These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths, and marriages are received with regard to the human family: 18 Am. & Eng. Ency. of Law, 258; *Flowers v. Haralson*, 6 Yerg. 494; *Rogers v. Park*, 4 Humph. 480; *Swink v. French*, 11 Lea. 79; 47 Am. Rep. 277; *Morris v. Swaney*, 7 Heisk. 591; *Ford v. Ford*, 7 Humph. 92. It

is true that, in family records, the entries in the books are usually made by the relatives and friends of the person, but inasmuch as dogs have no relatives competent to make entries for them, it is allowable for such entries to ³²⁵ be made by the owners, friends, and admirers of the dog.

Upon the general question as to the admissibility of evidence of the dog's pedigree, and the qualities and performances of his ancestors, we think there can be no doubt but that such evidence is competent. It is certainly competent to show pedigree upon the question of value of horses, cattle, and even sheep and swine—their different strains of blood, and especially as to horses and cows it is competent to show the qualities of the sires and dams and more remote ancestry, as these matters enter largely into the question of value. It is a matter of common knowledge that the same questions enter in the consideration of the value of dogs, not only such as are kept for common use, such as guard dogs, shepherd dogs, Newfoundland dogs, but also such as are kept for sporting purposes, such as grey, blood, and fox hounds, bird dogs, and others. There are high and low degrees among dogs as well as among men, and while the common coon dog has his value, it is not the same as that of the trained bird dog or the trained bloodhound. It is a matter of common knowledge and observation that certain strains of blood among horses add materially, if they do not entirely fix their values, and so among cows and hogs and sheep, and even among chickens and turkeys. Different strains of blooded horses are valuable because it is found that for generations the achievements of horses of that strain ³²⁶ have been noteworthy upon the turf and elsewhere, and so with dogs these qualities, as a matter of common observation, are much the same in the same strain for generation after generation. We think there is no error in admitting evidence upon these matters of pedigree, and the reputation of this particular dog killed is shown to have had what, in dog circles, is regarded as "blue blood," and among these he belongs to the inner circles of the four hundred, a member of the F. F. T., or first families of Tennessee. In addition, he was of English descent. His sire was Champion Tribulation, by imp. Beppo III., out of imp. Champion Lass of Bow, and so on for twenty or more generations. His dam was Dick's Sue, by Dick, out of Ida Heath, et cetera, for as many generations. It is fully shown that on both sides the ancestry is traced back to the best of English nobility blood in dog circles. The sire

of the dog is shown to have had a remarkable record in field trials and bench shows, and so with the dam.

Dogs of the grade of the dog that was killed, and with such pedigree, are shown by the proof to be worth from five hundred dollars to one thousand dollars in the market. It is also shown that this dog had had the distemper, and, under the proof, this added to his value one hundred per cent. It is attempted to show that this dog's descent may not have been entirely pure, and it is intimated that he may have had terrier blood in him, but the only foundation for this inference ³²⁷ is the fact that he "tarried" so long on the track when the car was approaching. But it appears from the record that it is a characteristic of the pointer, when he sets, to become oblivious to all earthly surroundings, and the bluer his blood the more absent-minded he becomes on such an occasion.

The question of pedigree is really important so far only as it bears upon the question of value of the animal killed. But it is evident, on examining the record, that the jury were not influenced by considerations of pedigree in fixing the damages, since they have named an amount below that fixed by any witness who placed a value upon the animal, based upon his pedigree, and adopted as their verdict the evidence given by the plaintiff and other witnesses of value, without regard to pedigree, and fixed the amount at the smallest sum named by him for the dog, taking in view his qualities, and in leaving out of view his ancestry or pedigree. The plaintiff fixes the value of the dog at two hundred and fifty dollars, without any reference to his blood or lineage, and in this he is sustained. He describes him as a handsome dog, very fast, wide ranger, very stanch on his game and to the gun, thoroughly broken, a fine retriever from land or water, with an excellent disposition. He is shown also to have been a valuable, reliable yard and house dog, and to have made himself generally useful and almost indispensable to the plaintiff's household.

With such an eloquent recital of the dog's qualities, the jury could not, perhaps, have given less ³²⁸ damages than two hundred and fifty dollars. The defendant company introduced no evidence of value, and no assignment is made that the damages are excessive. Whatever might be our opinion as to the value of a dog is immaterial, as we are controlled by the evidence in the record. While we have not passed seriatim upon the many errors assigned, we have considered them all, and given a general view of such matters as we consider important.

Upon the whole case, we are of opinion that the defendant company was guilty of negligence in the killing of this dog; that his death could have been prevented by the exercise of proper care and diligence; that he was fatally injured by the car, and killed as an act of humanity by his owner, and the company is liable for the killing. As to value, it is placed by the jury at the lowest estimate made by any witnesses, and evidently without regard to his pedigree or the performances of his ancestors.

We are satisfied with the verdict and judgment, and it is affirmed with costs.

RAILROAD COMPANIES—DUTY TO EMPLOY SUFFICIENT SERVANTS.—A railroad company is bound to employ all necessary officers and agents, and to instruct them in their respective duties, so as to secure to the public a safe transportation: *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 414; 75 Am. Dec. 564, and note; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; 98 Am. Dec. 229.

ANIMALS—PROPERTY IN—DOGS—ACTION FOR NEGLIGENT KILLING.—Dogs are property, and the owner may recover damages against a trespasser injuring them, although they have no market value: *Heilgmann v. Rose*, 81 Tex. 222; 26 Am. St. Rep. 804, and note; *State v. McDuffie*, 34 N. H. 523; 69 Am. Dec. 516; *Wheatley v. Harris*, 4 Sneed, 468; 70 Am. Dec. 258, and extended note. See *Graham v. Smith*, 100 Ga. 434; 62 Am. St. Rep. 323, and note. Dogs are the property of the owner as much as any other animal which one may have or keep: *Ten Hopen v. Walker*, 96 Mich. 236; 35 Am. St. Rep. 598, and note. The value of a dog may be either his market value, or some special or peculiar value to his owner, to be ascertained by reference to the usefulness or services of the dog: *Heilgmann v. Rose*, 81 Tex. 222; 26 Am. St. Rep. 804. It is a question for the jury, after hearing evidence of peculiar qualities and properties of the animal: *Dodson v. Mock*, 4 Dev. & B. 146; 32 Am. Dec. 677; *Parker v. Mise*, 27 Ala. 480; 62 Am. Dec. 776. Compare with the principal case, *Jemison v. Southwestern R. R.*, 75 Ga. 444; 58 Am. Rep. 476.

EVIDENCE—PEDIGREE OF LIVESTOCK.—In an action to recover for injury to a horse, evidence of his pedigree and that some of his blood relations were celebrated trotters, is competent and admissible as affecting his value: *Pittsburgh etc. Ry. Co. v. Shepard*, 56 Ohio St. 68; 60 Am. St. Rep. 732.

WILCOX v. HINES.

[100 TENNESSEE, 524.]

LANDLORD AND TENANT—CONTRACT TO REPAIR.—One not a party to a lease cannot recover of the landlord for injuries received because of his breach of a covenant to repair.

A LANDLORD IS ANSWERABLE TO A MEMBER of the lessee's family for injuries received from the defective condition of the leased premises independently of any covenant in the lease, if the landlord knew, or by the exercise of reasonable care might have known, of the dangerous and unsafe condition of the prem-

ises, and the person injured, without being guilty of contributory negligence on his part, was without such knowledge.

LANDLORD AND TENANT—NEGLIGENCE—NOTICE OF CONDITION OF PREMISES.—Evidence that a landlord's agent knew of the dangerous condition of the premises, that the landlord promised to repair them, and that he sent a carpenter to make such repairs, is sufficient to charge him with notice of the condition of the premises and to fix upon him a liability for such condition.

LANDLORD AND TENANT—LIABILITY FOR DANGEROUS CONDITION OF PREMISES.—If a landlord, seeing that the leased premises are in a dangerous condition, agrees to send some one to repair them and put them in a safe condition, and he sends one who leaves them unsafe, in consequence of which a person is injured, such landlord is answerable therefor.

LANDLORD—WHEN BOUND BY STATEMENTS OF HIS EMPLOYEES.—If a landlord sends a carpenter to repair premises, and the latter, after making some repairs, assures an occupant that they are safe, his statement is admissible against the landlord.

AGENCY—EXISTENCE OF, WHEN A QUESTION OF FACT.—If the evidence in support of a claim of agency is undisputed, then whether there was an agency is a question of law for the court; but if the evidence is disputed, the question presented is one of mixed law and fact, to be considered and determined by the jury.

EVIDENCE.—THE TERM "PREPONDERANCE OF EVIDENCE" does not mean a mere numerical array of witnesses, but it means the weight, credit, and value of the aggregate evidence on either side. If, however, the witnesses are of equal fairness, candor, intelligence, and truthfulness, equally well corroborated by the remaining testimony, and are equally free from interest in the suit, then the preponderance is shown by the number of witnesses.

JURY TRIAL—INSTRUCTIONS.—A reversal will not be directed because of the refusal of the trial judge to give an instruction unless it is strictly accurate.

R. McP. Smith, W. D. Covington, Vertrees & Vertrees, for Willcox.

Hamilton Parks, J. W. Gaines, and Edwin A. Price, for Hines.

520 McALISTER, J. The defendant in error, Miss Lillie Hines, recovered a verdict and judgment in the second circuit court of Davidson county against the plaintiff in error for the sum of four thousand five hundred dollars damages for personal injuries. The circuit judge being of opinion the damages were excessive, a remittitur of three thousand dollars was entered by the plaintiff, whereupon the court overruled the motion for a new trial and pronounced judgment in favor of the plaintiff for fifteen hundred dollars.

The facts from which this litigation was evolved were, briefly, viz.: In September, 1892, M. P. Hines and wife, Lucy S. Hines, father and mother, respectively, of Miss Lillie Hines, the defendant in error, rented of A. V. S. Lindsley, agent for J. M. Willcox, the plaintiff in error, a two-story dwelling-house on the

southwest corner of Church and McLemore streets, in the city of Nashville. The tenants went into possession October 1, 1892, and had been occupying the premises for about eleven months when the accident happened. The members of the family, including the defendant in error, were seated upon the back porch when it suddenly gave way, precipitating the defendant in error and others violently to the ground, whereby they sustained serious personal injuries. The gravamen of the action ⁵²⁷ as outlined in the four counts of the declaration are, viz.: 1. The plaintiff was living with her mother, Mrs. Lucy S. Hines, who rented the house under a contract with defendant that the same would be put in good, safe, and tenantable condition, and that the said Mrs. Hines, before she moved into the house, was assured by defendant that it had been put in good, safe, and tenantable condition, as promised and agreed; 2. That the house, when rented to the plaintiff's mother, was in an unsafe and dangerous condition, which fact was unknown to plaintiff, and which she could not have known by the exercise of due care and diligence, but which unsafe and dangerous condition was known to defendant, who concealed and withheld the same from said Mrs. Hines and plaintiff; 3. That after Mrs. Hines took possession of the house defendant visited the premises, and, his attention being called to needed repairs, he promised and undertook to repair, and did repair, the same, but did so in a careless and negligent manner; 4. That after Mrs. Hines took possession of the house, defendant undertook to repair and make safe said premises, and did repair the same, but did so in a careless, negligent, and unskillful manner.

Plaintiff further alleges that it was the duty and obligation of defendants, as landlords and owners of said property, of which her mother was tenant as aforesaid, to have put, kept, and maintained the ⁵²⁸ same in good, safe, and tenantable condition, suited to the uses and purposes for which the same was being occupied by her said mother and family. . . . Yet plaintiff avers that, in total disregard of her rights and their duties in the premises, said defendants carelessly, recklessly, and negligently allowed and permitted said property to remain in an unsafe, insecure, and dangerous condition, which said condition plaintiff did not know, but which defendant well knew, or ought to have known, and was by them negligently, willfully, and intentionally withheld, hidden and concealed from plaintiff, and in such a way as to mislead and deceive plaintiff with reference thereto.

"And plaintiff further avers that, for the purpose of mislead-

ing her with reference to the said condition of said property, said defendants falsely and fraudulently represented to her, and repeatedly assured her mother and herself that said property had been put and was in safe and tenantable condition, upon which representation and assurances on the part of said defendants plaintiff relied, as she had a right to do," et cetera.

In respect of the first count of the declaration, which alleges a contract to repair made by the agent of Willcox with M. P. Hines and wife, it suffices to say that Miss Lillie Hines was not a party to that contract: *Burdick v. Cheadle*, 26 Ohio St. 393; 20 Am. Rep. 767. This question was considered by this court in the case of *Stenberg v. Willcox*, 96 Tenn. 163, a suit growing out of the same accident, in which Mrs. Stenberg was injured. It was then said, viz.: "If plaintiffs can recover at all in this case, it must be upon the ground that the landlord leased premises in a dangerous and unsafe condition, when he knew, or might, by the exercise of reasonable diligence and care, have known, of such unsafe condition, and upon the further ground that plaintiff did not know of such unsafe condition, and could not have known of it by the exercise of reasonable diligence and care; and not upon any contract between the defendant and Mrs. Hines, of which Mrs. Stenberg may have known nothing, and to which she was not a party." It is not necessary, therefore, to consider further the first count of the declaration.

The first assignment of error that will be considered is that there is no evidence to support the verdict. It appears from the record that the porch in question was about twelve or thirteen feet in height, and that it was attached to the rear of the house, extending almost its entire width. There was a flight of stairs leading to a platform that connected with the main porch. This porch was supported by wooden posts and was joined to the house at the top, while the floor of the porch was supported by timbers which were mortised in the timber affixed to the wall of the house. The record shows that the collapse of the porch was due to the fact that the ⁵²⁹ tenons or ends of the timbers which fitted in the mortises had rotted, thus destroying the support upon which the floor of the porch rested. There was evidence tending to show that this porch was very old and quite dilapidated. Mrs. Dunn, a former tenant of the premises, had made complaint to the agent of the condition of this porch, and the latter had promised to repair it. This witness also stated that the agent of Willcox was frequently upon the premises, and was well acquainted with the dangerous condition of the porch.

There is also evidence tending to show that after Mrs. Hines took possession of the premises the attention of the landlord, Mr. Willcox, was called to the condition of this porch, and that he pronounced it safe, but promised that when the weather permitted he would have the porch put in good and safe repair. It also appears that very soon after this interview workmen went to the house and repaired the porch by placing a wooden post under one corner of it, and that a piece of tin was placed over the roof at the point where it joined the wall of the house, to prevent the rain from falling through upon the porch. It is not claimed that the attention of the landlord was challenged to the particular infirmity in the structure that caused it to fall, but, on the contrary, plaintiff states that she and her mother were both ignorant of this defect. There is evidence, however, tending to show that any carpenter of ordinary skill, in making repairs upon the porch, would have discovered the dangerous condition ⁵³¹ of the porch in the particulars just mentioned. It was argued that the carpenter sent by Willcox to repair the porch was his agent, and that for his negligence or unskillfulness in failing to discover the defects and dangers of the porch Willcox is liable. There was also evidence to the effect that, when this carpenter completed the work, he said, "The porch is all safe now." There was also evidence tending to show that John T. Lindsley, the agent of Willcox, had notice of the dangerous condition of the porch, and that he frequently promised to repair it during the occupation of the house by Mrs. Dunn. So that we find material evidence to support the finding of the jury.

The second assignment is, that the court erred in charging the jury that "if defendant, Willcox, saw that the porch was dangerous, after the Hines tenants moved in, and agreed to send some one to repair the porch and put it in safe condition, but that his workman failed to put it in a safe condition, but left it unsafe, and in consequence thereof plaintiff was injured," she was entitled to recover. It is insisted this charge was erroneous for the reason there were no facts shown in evidence to support it. In this counsel are in error. Mrs. Hines testified that when the defendant, Willcox, came, and in person inspected the premises, his attention was called to the condition of this porch, and that, while protesting that it was safe, he promised to have it repaired as soon as the weather would permit. He ⁵³² stated, to use the language of a witness, that he would "make it all safe and all." Moreover, counsel concede that the court, by other

instructions subsequently given, corrected the vice criticised in this charge. Their insistence is, that the court failed to withdraw the first charge, and the jury were confused by two conflicting instructions. We cannot assume, however, that the jury were misled, for the reasons stated.

The third assignment is, that the court erred in admitting testimony that after the post beneath the porch was fixed, the workman remarked: "Now, that is safe." On this subject the court, in its fifth instruction to the jury, said, viz.: "If you believe, from the proof, that the carpenter was sent there for the purpose of making the repairs, by the defendant or his authorized agents in charge of the property, then the statement or assurance of said carpenter, while performing the carpenter's work, with reference to the porch being safe, on the completion of the work he had been sent to do, would be admissible, and such statements would be binding upon defendant; but if the proof fails to establish the fact to your satisfaction, that defendant or his authorized agents, et cetera, did send said carpenter upon the premises for the purpose of making the repairs upon said porch, then said carpenter was not the agent or representative of defendant, and defendant is not bound by anything done or said by said carpenter in making said repairs.

533 The evidence above mentioned was objected to upon the ground that the court must find, before admitting such declarations, that the negro who fixed the post was the agent of defendant. It being a matter of controversy upon the proof whether the negro post fixer was employed by the defendant, the court declined to adjudge the question of agency, but left it as a disputed question of fact for the settlement of the jury. The alleged error of the trial judge was in submitting the admissibility of testimony to the jury, and in not determining it himself. It is insisted that if the admissibility of testimony depends upon any fact, that fact must be found by the court to exist. We are of opinion the ruling of the circuit judge was correct. In 1 American and English Encyclopedia of Law, second edition, page 967, the rule is stated thus: "If the evidence adduced to support a claim of agency is undisputed, whether it exists or not is one of law for the court. Whenever it is disputed, however, it is one of mixed law and fact, for the consideration of the jury aided by instructions from the court."

In the case of *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728, it was held that, "when the facts are undisputed, the question whether an agent has the requisite authority to bind his

principal is a question of law for the court, whether such authority is sought to be sustained by a previous authorization or by subsequent ratification."

In the case of *Savings Funds Soc. v. Savings Bank*, 78 Am. Dec. 390, the court said, viz.: "If the authority [of the agent] be created by power of attorney or other writing, the instrument itself must, in general, be produced, and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law, and are properly decided by the judge. But the authority may be by parol, or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name. . . . And in all instances, whether the authority, general or special, is to be implied from the conduct of the principal, or where the medium of proof of agency is *per testes* (by witnesses), the jury are to judge of the credibility of witnesses and of the implications to be made from their testimony. The court then said that, as the plaintiff did not produce any written evidence of Easten's authority, it was the duty of the court to inform the jury what constitutes agency, express or implied, special or general, and to refer to them the questions: 1. Whether the evidence satisfied them that Easten was either the general or special agent of defendants; and 2. Whether the issuing of the certificate in suit was within the scope of his authority?" *Mechem on Agency*, sec. 106.

It is true this court decided in *Self v. State*, 6 Baxt. 244, that where confessions are offered as evidence, their competency becomes a preliminary question to be decided by the court. This imposes ⁵³⁵ on the trial judge the duty of deciding the fact whether the party making the confession was influenced by hope or fear. This rule is so well established that if the judge allows the jury to determine the preliminary fact, it is error for which the judgment will be reversed. But this exception is recognized only in criminal cases, and is made in favor of life and liberty. In such cases, the only preliminary question settled by the court is, whether the confession was voluntary or made under duress.

The fourth assignment is, the court erred in excluding the testimony of Dr. Halley, a reporter for the "American," who called at the Hines residence just after the accident "to write it up." Witness talked with Miss Mamie Hines, an inmate of the house, and plaintiff's sister, who told him she had known, or had said, that if that porch wasn't fixed somebody would be hurt. The

object of introducing this evidence was to show that the unsafe condition of the porch was a fact within the knowledge of at least one of the inmates of the house, and that such fact should have been known by plaintiff. If this evidence was competent for any purpose, it should have been proved by Mamie Hines, who was not offered as a witness. But we fail to perceive how plaintiff could be affected by the knowledge of her sister in respect of the unsafe condition of the porch, and we think the evidence was properly excluded.

The fourteenth assignment is, that the court erred in refusing the following request, to wit: "The jury ⁵³⁶ should be governed in their finding by the preponderance of the evidence, and this does not mean the number of the witnesses, but the greater weight of the testimony, everything being considered which it was proper to consider."

This request is not strictly accurate on its face, since the preponderance of evidence may be determined, under certain conditions, by the number of witnesses testifying to a particular fact or state of facts. For instance, "one or two witnesses may testify to a given state of facts, and six or seven witnesses, of equal candor, fairness, intelligence, and truthfulness, and equally well corroborated by all the remaining evidence, and who have no greater interest in the result of the suit, testify against such state of facts, then the preponderance of the evidence is determined by the number of witnesses": Sackets' Instructions to Juries, 39. It is well settled, however, that by the term "preponderance of evidence" is not meant the mere numerical array of witnesses, but it means the weight, credit, and value of the aggregate evidence on either side: Coles v. Wrecker, 2 Tenn. Leg. Rep. 14; Hill v. Goodyear, 4 Lea, 243; 40 Am. Rep. 5.

The court in the present instance was requested to charge that the preponderance of evidence does not mean the number of the witnesses, et cetera. If the request had stated that preponderance did not mean the number of the witnesses merely, it would have been accurate. A reversal will not be made for refusal ⁵³⁷ of trial judge to give an instruction, unless it is strictly accurate: Sommers v. Mississippi etc. R. R. Co., 7 Lea, 201; East Tennessee etc. R. R. Co. v. Gurley, 12 Lea, 46; Railway Co. v. Wynn, 88 Tenn. 332. The court in this case charged that the burden of proof rested upon plaintiff to establish her case by a preponderance of the evidence. The court also charged that the jury were to dispassionately weigh all the evidence, "giving such weight to the several witnesses as their char-

acter, intelligence, manner of deposing, general bearing, relationship, consistency or inconsistency of statements may appear. . . . If possible, try and reconcile all the statements, so that all may appear to have told the truth." We think in these instructions the trial judge, in effect, told the jury that the preponderance of evidence did not consist alone in the numerical array of witnesses, but was to be determined upon a consideration of the character of the witnesses, their intelligence and interest, et cetera.

The remaining questions arise upon the charge of the court, which is in strict accord with the principles laid down in *Hines v. Willcox*, 96 Tenn. 148; 54 Am. St. Rep. 823. Judge Beard and the writer are of opinion those cases were erroneously decided and should be overruled. A majority of the court, however, adhere to those rulings, and the result is the present judgment is affirmed.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR FAILURE TO REPAIR.—A landlord who leases premises which are at the time in an unsafe and dangerous condition is liable to his tenant for damages that may result therefrom, if he knows the fact and conceals it, or if, by reasonable care and diligence, he could have known of such dangerous and unsafe condition; provided, that the tenant exercises reasonable care and diligence to ascertain the condition of the premises: *Hines v. Willcox*, 96 Tenn. 148; 54 Am. St. Rep. 823, and note; *Metzger v. Schultz*, 16 Ind. App. 454; 59 Am. St. Rep. 323, and note. The owner of premises, prima facie, is not liable for an injury to a third person from a nuisance or want of repairs thereon, or on the adjacent highway, but that the party injured must look to the tenant or actual occupant: See monographic note to *Lowell v. Spalding*, 50 Am. Dec. 780; *McConnell v. Lemley*, 48 La. Ann. 1433; 55 Am. St. Rep. 319, and note. The covenant of a landlord to repair does not inure to the benefit of a stranger sustaining an injury because of its breach: *Sterger v. Van Sicklen*, 132 N. Y. 499; 28 Am. St. Rep. 594, and note.

AGENCY—EXISTENCE OF—QUESTION OF LAW AND FACT. The question of agency is a mixed one of law and fact, and the jury should be directed to determine from the evidence in the case for whom the persons claimed to act were acting: *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400; 57 Am. St. Rep. 140. Whether an agency exists under an ascertained state of facts is a question of law to be determined by the court, but it is within the province of the jury to find whether the facts necessary to establish the agency exist: *Seehorn v. Hall*, 130 Mo. 257; 51 Am. St. Rep. 562, and note.

APPEAL—REFUSAL TO INSTRUCT.—Refusal to give special instructions asked for is not error, unless each of them asserts a correct proposition of law: *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853. It is not error to refuse to give an erroneous instruction: *Hangen v. Hachemeister*, 114 N. Y. 566; 11 Am. St. Rep. 691; *Evanville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 456.

WILCOX v. HINES.

[100 TENNESSEE, 528.]

LANDLORD AND TENANT—LIABILITY FOR DEFECTIVE CONDITION OF PREMISES, FOUNDED UPON NEGLIGENCE.—There is a liability not founded upon contract existing against a landlord for his negligence or wrong in leasing dangerous premises, for which a tenant or other occupant may recover if injured, when the defect is of a hidden character known to the landlord and not disclosed to the tenant or other occupant.

LANDLORD AND TENANT—HIDDEN DEFECTS—LIABILITY OF LANDLORD FOR.—A landlord is answerable to his tenant for injuries received by the latter from hidden defects in the leased premises existing at the date of the lease of which he was ignorant and of which the landlord knew, or might have known, had he exercised reasonable care and diligence. This liability does not rest upon contract or warranty, but on the obligation implied by law that the landlord will not expose the tenant or the public to danger, of which he knows, or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence.

A LANDLORD IS LIABLE FOR SUCH DEFECTS and dangers as were in existence when the lease was made, provided he knew of them, or ought to have known of them, and provided also that the tenant did not know of them and could not know of them, both parties exercising reasonable care and diligence.

LANDLORD AND TENANT.—THE RULE OF CAVEAT EMPTOR as between landlord and tenant applies only so far as the rights of the parties rest upon contract, or when the tenant has an opportunity to examine the premises, and the defect is so obvious and the danger so apparent that he can see them by using ordinary care and diligence.

R. McP. Smith, E. H. East, Vertrees & Vertrees, for Willcox.

Hamilton Parks, J. W. Gaines, and E. A. Price, for Hines.

539 WILKES, J. This is an action by a tenant against a landlord for injuries received from the defective condition of leased premises. The case has been before the court heretofore, and opinions were rendered, reported in *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, 96 Tenn. 328, which states quite fully the facts and contentions as then made. At the last trial of the cause in the court below, there was a verdict for plaintiff for two thousand three hundred dollars, and, on motion for new trial, upon suggestion by the presiding judge, five hundred dollars of this amount was remitted, and for the balance, eighteen hundred dollars, judgment was rendered, and defendant has appealed and assigned errors.

It is insisted that the court erred in following the rule laid down in *Hines v. Willcox*, 96 Tenn. 328, *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, and *Stenberg* **540** v. *Willcox*,

96 Tenn. 163, as to the relative duties and liabilities of the landlord and tenant in regard to dangerous premises, and it is earnestly insisted these cases are not a correct exposition of the law. The contention, in brief, is, that in the cases referred to, this court laid down a rule not supported by authority, devolving a duty of active diligence upon the landlord to know the condition of his property when he leases it, as to its safety, and it is insisted the true rule in ordinary cases of rental is "caveat emptor," and the duty of examining the premises is upon the tenant, and, in the absence of fraud or warranty of condition by the landlord, the tenant takes the property at his own risk. It is insisted that this has been the rule recognized and followed in this state up to the cases of *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, and *Stenberg v. Willcox*, 96 Tenn. 163, and that the court, since the 96 Tennessee case, has returned to and reaffirmed this rule in the case of *Schmalzreid v. White*, 97 Tenn. 39.

In regard to the latter case, it is only necessary to say that in it it is expressly stated that what was therein said was not intended to conflict with the case of *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, and that case was distinguished from the *Hines* and *Willcox* case. In the case in 97 Tennessee the court held that the trial judge erred in holding the landlord liable, though he may have been ignorant of any defects and conditions, without fault or negligence on his part, thus making the landlord an insurer of the condition of ⁵⁴¹ his premises. In *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, the landlord was not held to such strict liability, but only held liable for what he knew, or might have known by the exercise of reasonable care and diligence, and then only when the tenant failed to ascertain such facts by the exercise of reasonable care and diligence on his part. There is no conflict in the two cases so far as the real questions presented are involved.

Prior to the case of *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, there are in Tennessee only three cases in which the question of the liability of the landlord to the tenant, under conditions somewhat similar to the present, are considered.

The first is the case of *Banks v. White*, 1 Sneed, 613. In that case the leased premises became untenable during the pendency of the lease, caused by the acts of the city authorities in opening new streets, and not by any act of the landlord or any defect in the premises themselves when they were leased, and the court held that the law does not imply any warranty as to

the continuing condition of the property demised—a rule laid down in all the cases and questioned in none, but one wholly different from the principle involved in the present case, which relates to the condition of the premises when leased, and not to any subsequent changes, contingencies, or conditions during the lease.

Another case is that of *Southern Oil Works v. Bickford*, 14 Lea, 659. That was a case of a suit by a landlord against a tenant for improperly using ⁵⁴² and abusing the premises during the continuance of the lease, whereby the houses were broken down. It did not involve the liability of the landlord to the tenant, arising out of the dangerous or defective condition of the premises when they were leased in any way.

In *Young v. Bransford*, 12 Lea, 244, in treating of liability to the public for the condition of the premises, it is stated that it is the duty of the tenant or occupier to keep the premises in repair so far as to make them safe to the public. This, it will be seen, also relates to the continuing condition of the premises pending the lease. The same case adds: "The landlord is liable when he covenants to keep the premises in repair, or when the defect exists at the time of the lease": Citing 1 Thompson on Negligence, 317; Wharton on Negligence, 817. This is the only case in our state, up to that time, prescribing the rule of liability between the landlord and tenant at the time the lease is made, and it holds the landlord liable for defects and dangerous conditions existing at that time.

We are also cited to the case of *Doyle v. Union Pac. Ry. Co.*, 147 U. S. 413, as being a case elaborated with great research and ability. In that case a railroad had let to a party a house which, during the continuance of the lease, was overwhelmed with a snowslide. There was no defect in the premises when let; the snowslide was the act of God occurring afterward, and the landlord was in no way ⁵⁴³ responsible therefor. The premises were safe when leased, so that this was also a case of continuing condition, and the landlord was not held liable.

The case of *Viterbo v. Friedlander*, 120 U. S. 712, is also referred to, but that was a Louisiana case, in which the rules of the civil law were applied, and the doctrine of the common law only incidentally mentioned, and not at all involved in the decision of the case, and not commented on or explained.

In the case of *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, it was laid down as a rule that if there was a duty devolving on the landlord to inform the tenant of a defect in the premises,

there would be no distinction, as a ground of liability, between an intentional and an unintentional neglect to perform it, and there could be no such duty without knowledge of the defect. But this is evidently opposed to the great weight of authority, which discriminates between the intentional and unintentional neglect to perform a duty, the former being a fraud or tort and the latter not. In this case it appears that a step in a stairway had been sawed out, and the landlord knew it and tested it, and deemed it safe, but the tenant, it seems, did not know it, though he had some opportunity to ascertain it, and it was held that he could not recover because of an injury from it. This is an extreme case, which does not commend itself by its facts or reasoning to general approval. The defect was one which no tenant would expect ⁵⁴⁴ or be on the lookout for, and, while known to the landlord, it was not called to the tenant's attention, and was clearly a trap which the tenant did not see, and could not anticipate nor discover with any reasonable care.

The case of *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659, is also referred to with approval, and from it is cited an extract, as follows: "It is a universal rule, to which no exception can be found in any case now regarded as authority, that, upon the demise of real estate, there is no implied warranty that the property is fit for occupation or suitable for the use or purpose for which it is hired." This evidently has reference alone to the liabilities arising out of the contractual relation between the landlord and tenant. The same case, on page 661, recognizes a distinct ground of liability resting upon the delictum of the landlord, and not on contract. It says: "If he [the landlord] demises premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which will, in many cases, impose responsibility upon him." And again, same page: "The responsibility of the landlord is the same in all cases. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly ⁵⁴⁵ constructed that the floors will break down from the weight necessary to be placed upon them, his negligence imposes liability upon him for injury to the person or property of anyone who may be lawfully upon the premises using them for the purposes for which they were demised."

The case of *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438,

is also cited, and in that case it is held, without any mature consideration, that, in the absence of fraud or warranty, the landlord is not liable for the present or future condition of leased premises, but the case evidently considers only the liabilities arising out of the contractual relation of the parties, and does not refer to such liabilities as arise out of the delictum of the landlord. And the same may be said of *Keates v. Cadogan*, 10 Com. B. 591, and *Robbins v. Jones*, 15 Com. B., N. S., 240, referred to, which simply state the rights arising out of the contractual relation, and do not consider the matter from the standpoint of delictum on the part of the landlord. But in the case of *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, the court is evidently influenced, if not controlled, by the fact that the defendant did not know, or have any reason to suspect, that the premises were dangerous, thus impliedly recognizing the doctrine of some care upon the part of the landlord, and relieving him because he did not know or have reason to suspect.

It may be conceded that no ground of liability arises out of the contract between the landlord and tenant in the absence of fraud or warranty, but a ⁵⁴⁶ great number of cases in which the question has been considered hold that there is an independent ground of liability arising out of the delictum or wrong of the landlord in leasing premises dangerous at the time, and there is not necessarily any conflict between the two classes of cases when properly understood. This distinction was attempted to be pointed out in *Hines v. Willcox*, 96 Tenn. 332-334, and cases were cited.

There is also a distinction drawn in the cases between patent and hidden defects. In the former, when the landlord and tenant exercise the same care, and have equal opportunities for examination, there is no ground of liability on the part of the landlord to the tenant, inasmuch as the negligence of the landlord is neutralized in its effect by the negligence of the tenant, and the ordinary rule of contributory negligence by the injured party applies to defeat any recovery by the tenant. In regard to hidden or secret defects or dangers, the cases are uniform that if they exist and are known to the landlord and not disclosed to the tenant, the landlord will be liable, because such conduct amounts to a fraud.

It is insisted, however, that in such cases of hidden defects there is no liability in the absence of actual knowledge on the part of the landlord, and fraud and deceit practiced by him. The case of *Hines v. Willcox*, heretofore reported, goes one step fur-

ther than this, and holds the landlord liable, ⁵⁴⁷ not only if he has actual knowledge, but also if by the exercise of reasonable care and diligence he could have such knowledge, and it is only upon this latter proposition that there is any difference of opinion. Hence it is strenuously insisted that no active duty devolves upon the landlord to ascertain such hidden defects and dangers, and, in the absence of actual knowledge, the landlord will not be liable for any damages. The logic of this position is that a landlord is under no obligation to know anything about the condition of his premises, whether they are dangerous or safe, whether habitable or a nuisance, and so long as he keeps himself ignorant, either intentionally or negligently, he cannot be held liable for any damages resulting from the dangerous condition of his property when leased. But if, by accident or examination, he becomes aware that a secret defect does exist, then he is liable if he fail to disclose it. Under this ruling the landlord is placed in the better condition the more negligent and inattentive he is, and a premium is put upon his ignorance.

In the case of *Hines v. Willcox*, 96 Tenn. 328-348, the rule is laid down that he is liable for what he knows, or by the exercise of reasonable care and diligence ought to know, about his property, provided the tenant at the same time exercises reasonable care and diligence, and the authorities were cited. It was not attempted in the 96 Tennessee case to lay down the degree of diligence that the landlord ⁵⁴⁸ must exercise, the trial judge having in his charge relieved him from any diligence or duty whatever, and the question before the court being whether such charge was correct as thus broadly put. It was said, however, page 331, that "the rule laid down does not place upon the landlord the obligation of an insurer or warrantor by contract, nor does it impose the extreme duty of constant care and inspection," but only reasonable care and diligence, and the like reasonable care and diligence is required of the tenant, thus imposing reasonable care and good faith upon both in the absence of any contract or warranty.

Several cases were cited supporting the holding as thus made, and others might have been collated from the mass of authorities upon the subject. The case of *Hines v. Willcox* has been re-reported in 34 *Lawyers' Reports*, 824, and extensively annotated by Mr. Henry P. Farnham. The learned annotator states that the case is a new departure in the law of landlord and tenant, and he has industriously collated authorities to sustain his assertion, and has commented upon some of the authorities cited, leaving,

however, the great bulk of the cases cited in *Hines v. Willcox* without comment. The annotation is valuable as a brief upon the liability of the landlord to the tenant arising out of the contractual relation, but it is to be regretted that the learned annotator did not also collate the authorities bearing upon the true question presented in the *Hines v. Willcox* case ⁵⁴⁰ of delictum on the part of the landlord in leasing dangerous premises, and did not comment more fully upon the numerous authorities imposing upon the landlord some obligation to know the condition of the premises when leased.

Quite a complete and discriminating review of the authorities up to date of 1886 is found in the case of *Lowell v. Spaulding*, 50 Am. Dec. 776-783. See, especially, this feature treated at page 780, with citations.

The ground of liability upon the part of a landlord when he demises dangerous property, has nothing special to do with the relation of landlord and tenant. It is the ordinary case of liability for personal misfeasance, which runs through all the relations of individuals to each other. As is substantially said by Ruger, chief justice, in *Edwards v. New York etc. R. R. Co.*, 50 Am. Rep. 673 (dissenting opinion): "The liability does not rest upon the theory of an express contract between the owner and person injured, but on the obligation which the law imposes on all to so keep and use their property that others using it and entering upon it by their invitation shall not be injured by its improper condition or unfitness, and its inadequacy for the purposes to which it has been devoted." And as is stated in *Cowen v. Sunderland*, 145 Mass. 363, 1 Am. St. Rep. 469, quoted in *Hines v. Willcox*, 96 Tenn. 333, there is an exception to the general rule of caveat emptor as between lessor and lessee, "arising from the duty which the lessor owes to the lessee. This ⁵⁵⁰ duty does not originate directly from the contract, but from the relation of the parties, and is imposed by law." It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law not to expose the tenant or the public to danger which he knows, or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence.

"In cases where lessors have been held liable for injuries to lessees, the liability is founded on negligence. . . . The action of tort has for its foundation the negligence of the defendant, and this means more than a breach of promise. . . . There

must be some breach of duty distinct from breach of contract," et cetera: *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 174, 175.

In *Kern v. Myll*, 80 Mich. 530, it is said in a suit between tenant and landlord: "The cause of action does not rest upon any covenant, express or implied, of the landlord to repair the premises, nor that they were habitable at the time the lease was made, nor does it rest necessarily upon the relation of landlord and tenant. . . . But the cause of action is based upon the maxim that every person must so use his own premises as not to injure others either in person or property." The declaration showed a nuisance when the premises were leased, known to defendant and concealed from plaintiff, calculated to injure his health.

⁵⁵¹ On the former trial of this cause a few cases were cited upon the point of liability of the landlord, where he knows, or by using reasonable care and diligence ought to know, of the danger or nuisance, but it was not attempted to cite them all. The following were cited in *Hines v. Willcox*, 96 Tenn. 335: *Martin v. Richards*, 155 Mass. 381; *State v. Boyce*, 73 Md. 469; *Carson v. Godley*, 26 Pa. St. 111; 67 Am. Dec. 404; *Coke v. Gutkese*, 44 Am. Rep. 499; *Lindsey v. Leighton*, 150 Mass. 288; 15 Am. St. Rep. 199; *Moynihan v. Allyn*, 162 Mass. 272; *Pingrey on Real Estate*, sec. 592.

We add others, but by no means all that may be cited: *Albert v. State*, 66 Md. 325; 59 Am. Rep. 159; *Timlin v. Standard Oil Co.*, 22 Am. St. Rep. 849-851; *Wood on Landlord and Tenant*, 855; *Cowen v. Sunderland*, 145 Mass. 363; 1 Am. St. Rep. 469; *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 122; *Butler v. Cushing*, 48 Hun, 618; *Cutter v. Hamlen*, 147 Mass. 471; *Booth v. Merriam*, 155 Mass. 521; *Oxford v. Leathe*, 165 Mass. 255; *Wilcox v. Zane*, 167 Mass. 306; *Lynch v. Swan*, 167 Mass. 510; *Matthews v. Degraff*, 13 N. Y. App. Div. 356; *O'Dwyer v. O'Brien*, 13 N. Y. App. Div. 570; *Metzger v. Schultz*, 16 Ind. App. 454; 59 Am. St. Rep. 323.

In *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159-161, a wharf was rented, and it was said: "If defendant knew, or by exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, the plaintiff was entitled to recover."

The true doctrine is well stated in *Timlin v.* ⁵⁵² *Standard Oil Co.*, 22 Am. St. Rep. 849: "The law does not impose upon the landlord the duty of constant care and inspection of premises. It imposes upon him the duty of reasonable care to inform

himself of the condition of the property which he proposes to let, and if, at the time of leasing, he knew, or if, in the exercise of reasonable care, he would become informed of, the fact that the property has upon it a nuisance dangerous to the public, or to an adjoining owner, it imposes upon the owner and proposed lessor the duty to abate it before he leases the property, and if he does not, it leaves him with a liability to respond in damages to anyone injured in consequence of and by the nuisance." And again it is said, page 851: "If he was, in truth, ignorant, and yet by the exercise of reasonable care and diligence he would have known of its existence, there is no principle that can exempt him from responsibility any more than if he created the nuisance himself."

In *Wunder v. McLean*, 19 Am. St. Rep. 702, the matter is presented in a shape that shows the sound reason and good sense of the rule that the landlord is liable if the premises are dangerous when he leases, and the tenant if they become dangerous when he has them leased. It is laid down that the landlord is liable if the premises are a nuisance when leased, and he cannot escape liability by leasing the property to a tenant and putting him in possession. To the same effect are *Knauss v. Brua*, 107 Pa. St. 553 85; *Fow v. Roberts*, 108 Pa. St. 489; *Leonard v. Storer*, 15 Am. Rep. 78, 79, note; *Ingewersen v. Rankin*, 54 Am. Rep. 109; *Tomle v. Hampton*, 129 Ill. 379; *Kern v. Myll*, 80 Mich. 525; *Riley v. Simpson*, 83 Cal. 217; *Nugent v. Boston etc. R. R. Co.*, 80 Me. 63; 6 Am. St. Rep. 151; *Lowell v. Spaulding*, 50 Am. Dec. 780, notes.

In *Cutter v. Hamlen*, 147 Mass. 475, the court held that when the landlord knew the drains were defective, and also that diphtheria had been in the house, the jury would have been warranted in finding that the landlord knew, or ought to have known, as a prudent man, that this was dangerous.

In *Lindsey v. Leighton*, 150 Mass. 288, 15 Am. St. Rep. 199, the court was asked to charge that it must be known that the defendant had knowledge of the defect, or they could not hold him. The trial judge refused, and, on appeal, the supreme court said this refusal was correct, that it was not necessary to show that defendant had actual knowledge of the defect. His duty was that of due care, and ignorance of the defect was no defense: Citing *Gill v. Middleton*, 105 Mass. 477; 7 Am. Rep. 548; *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, 129 Mass. 33; 37 Am. Rep. 295; *Watkins v. Goodall*, 138 Mass. 533. This was a case of defect in steps leading to a tenement occupied by

plaintiff. There was evidence that defendant's attention had been called to the defect, and he had frequently passed over the steps.

In *Martin v. Richards*, 155 Mass. 386, the court ⁵⁵⁴ held that if the condition of the vault, in 1886, was dangerous, and defendant's attention was called to it, and he undertook to remedy it and used means which were ineffectual to remedy it, and which he knew, or ought to have known, were ineffectual, he cannot escape liability by employing a servant to do the work and escape consequences of the servant's neglect to do the work properly. The knowledge of the servant must be imputed to the master: Citing *Baldwin v. Casella*, L. R. 7 Ex. 325; *Gladman v. Johnson*, 36 L. J. Com. P. 153; *Applebee v. Percy*, 43 L. J. Com. P. 365.

In *Moynihan v. Allyn*, 162 Mass. 272, it was held that the minor could not recover because the defect was in existence when the premises were let. The defect was in a platform common to several tenants, but the controlling feature was, that its condition could have been ascertained by reasonable examination of the tenant. The court held that defendant's duty was to keep the platform in as good condition as when leased, and to inform the tenant of any hidden defects which could not be discovered by reasonable diligence.

In *Booth v. Merriam*, 155 Mass. 522, it is said: "If there is a concealed defect that renders the premises dangerous, which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for any injury which results from his concealment of it. It ⁵⁵⁵ is also said in the case that there was nothing to show that defendant had actual knowledge of the danger or was culpably responsible for it, and that it was such as could have been easily discernible.

In *Oxford v. Leathe*, 165 Mass. 255, the landlord was held liable for the condition of a platform used to go into a place of public amusement, on the ground that he must have contemplated the public would go on it and the liability is stated to be just the same as if the premises are let with a nuisance upon them: Citing many familiar cases.

In *Wilcox v. Zane*, 167 Mass. 306, nurse of tenant was injured by defective condition of roof used by all the tenants in the building to hang out clothes and other purposes. There was no evidence that plaintiff did not exercise due care. There was evidence that the plank which broke was badly decayed, cross-grained, and knotty, and no repairs had been made on the roof for years. The plaintiff testified that he had never noticed the

defect. It was held that she had no such duty to observe the condition of the roof as to safety as the landlord had.

In *Lynch v. Swan*, 167 Mass. 510, there was an injury upon a common stairway used by several tenants. The court says there was some evidence that the step was not strong enough, and the question was whether or not the landlord knew this or ought to have known it. It was not so apparent that plaintiff could be held to take the risk. The court say the question is this, Was there evidence for the ⁵⁵⁶ jury that the landlord ought to have known it, or would have known it if he had exercised reasonable care? And again the court emphasizes what the landlord knew, or ought to have known, as the controlling feature in the case.

In *Matthews v. DeGraff*, 13 N. Y. App. Div. 356, it was held to be the duty of a landlord to keep in repair a coal-hole or chute in the sidewalk in front of premises which he leased, and that he must, from time to time, examine and see its condition, even though the same tenant held over from term to term, and it is put on the ground that it is the duty of the landlord to examine and ascertain the condition of the property when he leases it, and the holding over from term to term was in effect a new lease each term. This proceeds upon the idea that the landlord owes a duty to the public to have his premises safe when he leases them, even though the obligation is on the tenant to make repairs during the lease.

In *O'Dwyer v. O'Brien*, 13 N. Y. App. Div. 570, it was held that the landlord would be liable for the defective repairing of a plank walk on the premises used by plaintiff but for the fact that the tenant could and did see the defect and danger, and was thus guilty of such contributory negligence as would defeat her recovery.

In *State v. Boyce*, 73 Md. 469, it was held that the owner of a wharf was not liable for injuries sustained by an employé of a lessee from a rotten ⁵⁵⁷ plank unless it appears that the owner knew, or by reasonable care and diligence could have known, the unsafe condition of the wharf when he leased it: See, also, *Metzger v. Schultze*, 16 Ind. App. 454; 59 Am. St. Rep. 323.

It was not held in *Hines v. Wilcox*, 96 Tenn. 333, that a landlord is liable for a defect which occurs or a danger that arises after the lease has been made and while the tenant is in possession. For these defects and dangers the tenant not only has no recourse against the landlord, but he is, on the contrary, liable himself to third persons who may be injured. But the landlord is liable for such defects and dangers as are in existence when the

lease is made, provided he knew of them or ought to know of them, and provided also that the tenant does not know of them and could not know of them, both parties in the matter exercising reasonable care and diligence. Several distinctions are attempted to be drawn, but so far as they affect the question of the duty of the landlord to know the condition of his premises, there is no ground for any difference in its application. It is said that many of the cases in which the expression "ought to know" is used in regard to the landlord are cases in which the landlord remains in possession of a portion of the premises while other portions of the same premises are in the possession of other tenants. But the only difference between the two classes of cases appears to be this, that the liability of the landlord ordinarily ceases if he rents ⁵⁵⁸ out the entire premises, but when he retains part it continues so long as he is in possession of such part used for common purposes. When the entire premises are leased, the landlord is liable if the premises are dangerous when he makes the lease, but ordinarily not longer; when he remains in possession of a portion, his liability continues so long as he remains in possession of that portion not leased. In the former cases, it is his duty to know the condition when he leases; in the latter, to know the condition so long as he retains control of any part of the common property. The obligation in either case to know the condition of the property is the same, but in the former it ceases after the tenant enters; in the latter it is a continuing obligation while the landlord retains possession.

It is said that some of the cases cited are cases of public property, such as docks, wharves, theaters, and other places of public resort, and it is attempted to show that these form exceptions to the general rule. Even if this were so, it could not avail in this case, as the property in this case was rented for boarding-house purposes, and so known to the landlord or his agent. But we are unable to see any ground for the application of a different rule in such cases. In the one case we have an instance of a quasi public nuisance, in the other a case of quasi private nuisance. But the obligation not to expose the individual to danger is the same as that not to expose the public to danger.

⁵⁵⁹ It has been said that a private nuisance "is anything done, . . . or omitted to be done, contrary to a legal duty, from which an injury results to another" (16 Am. & Eng. Ency. of Law, 929, 930), and there is no difference in principle between a condition which is called a private and one called a public nuis-

ance. One is where the danger is to the individual, the other when it is to a number of individuals or the entire public.

So far as there is any obligation on the landlord to know the condition of his property, it does not matter whether the dangers and defects are patent or secret, unless, indeed, there is some more stringent duty in the latter case, inasmuch as it may be presumed that as to patent dangers they will most probably be seen by the tenant if he has the opportunity of examination. But to hold that the rule of caveat emptor applies to all cases of rental when there is no warranty, is to ignore the large mass of cases, which hold the landlord liable: 1. If he is guilty of fraud or deceit; 2. If he leases premises which are dangerous when leased. The result of this doctrine if carried out is that if a tenant has no opportunity to examine the premises he must nevertheless take them at his own risk. If, for instance, a landlord leases premises in a distant city which the tenant does not see, and has no opportunity to examine, under the rule of caveat emptor, if the tenant enters without an opportunity for examination, and is injured by the dangerous and defective condition of ⁵⁶⁰ the premises, the landlord is not liable. Such doctrine is not based on any sound reason, and the true rule is, that the rule of caveat emptor only applies so far as the rights of the parties rest on contract, or when the tenant has an opportunity to examine the premises, and the defect is so obvious and the danger so apparent that he can see it by using ordinary care and diligence.

It is argued with much earnestness and ability that, in order to make the rule operative, it must be held that the landlord is required to exercise a greater degree of diligence and care than the tenant. But this position is not, we think, well taken. The degree of care and diligence required of each is the same—that is, reasonable care and diligence, such as a reasonably prudent person would exercise if surrounded by the same or similar circumstances. From the very nature of the case the same degree of care and diligence exercised by each would in many, if not all cases, enable the landlord to know more than the tenant. The former owns the property, has daily access to it and an opportunity to know its condition, and his attention is or may be called to defects by previous tenants. The tenant sees the property but once perhaps, and that in a more or less hurried manner. Not being familiar with the premises, he cannot by such inspection know as much of the property as the landlord does. Again, each may see the same defect, and the danger arising out

of such defect may not be ⁵⁶¹ apparent at a glance or single examination such as the tenant can make, and he may well presume, that if dangerous, the landlord would not let it, nor would previous tenants have occupied it. The landlord, however, may have had his attention called to the defect by prior tenants, and he may have observed them time and again. In such case it would be obligatory upon him to ascertain the cause and extent of the defect, and whether dangerous or not. The opportunities and means of information of the landlord are necessarily greater than those of the tenant, when both exercise the same degree of care and diligence. This idea is forcibly illustrated in the present case, where a defect was clearly apparent, but the cause of it and the danger arising out of it were not. The tenant, looking at the opening between the porch and wall, would not discover its cause upon a single examination, and he might well presume that it only amounted to a matter of some discomfort and inconvenience from falling rains and snows. But the landlord's attention had been called to it more than once by a former tenant, and he had been notified of the danger. Under such circumstances, it was incumbent on him to have examined into the extent and cause of the defect, and the proof is clear that the danger would have appeared to any workman or other person who would investigate the cause of the defect.

It is said this rule of reasonable diligence on the ⁵⁶² part of both landlord and tenant destroys itself, for if the danger is apparent either party may see, and, the negligence of the landlord being neutralized by that of the tenant, there can be no recovery. Even if this were so, it is no more than the application of a similar doctrine in many other relations of life, as, for instance, when the negligence of the master is neutralized by the contributory negligence of the servant, so as to prevent the latter from recovering when he would be otherwise entitled to recover.

So, also, in case of railroad or other accidents and injuries, a party injured has the right to recover because of the negligence of the railroad or other party, but he may lose this right because his own negligence has contributed to and is the direct cause of the injury, and the same rule applies in other relations.

It is evident, however, that this rule of counterbalancing negligence can only apply to cases where the tenant has the opportunity to see, examine, and ascertain not only the defects but also the dangers equally with the landlord.

The trial judge in his charge followed substantially the rules laid down in *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep.

823, and *Stenberg v. Willcox*, 96 Tenn. 163, and upon a re-examination of these cases, after the ablest arguments and most severe criticism, the majority of the court does not see that the principles there laid down, when properly understood and applied, ⁵⁶³ are wrong. Judges Beard and McAlister do not concur in the rules there laid down.

In the case now on trial there are other features that are equally conclusive of the plaintiff's right to recover. There is evidence in the record tending to show that the plaintiff actually knew the dangerous condition of the porch when the lease was made, also that he had his attention called to such dangerous condition after the lease was made, and promised and undertook to make it safe, and sent a carpenter to make the necessary repairs, and that after they were made the tenants were assured the premises were safe. It is true there is some conflict on both the points as to what repairs were promised and what were made, but there is evidence from which the jury would be warranted in holding as they did, and in concluding that the undertaking and effort of the landlord was not merely to shut out the snow and rain by tacking a little tin over the opening, but to make the porch safe and secure, and the evidence is quite clear that any ordinary carpenter or workman, in attempting to make any repairs, could not but see the dangerous conditions existing. Upon this point see the cases of *Werthheimer v. Saunders*, 95 Wis. 573; *Martin v. Richards*, 155 Mass. 386, and cases there cited.

We are of opinion there was evidence to warrant the jury in believing that the premises in this case were in dangerous condition when they were let; ⁵⁶⁴ that while the fact was to some extent patent, the danger was not so apparent that the plaintiff, in the exercise of ordinary care and diligence, could have known of it; that there was an obligation upon the landlord to make such examination of the premises as a reasonably prudent man would do in order to ascertain their condition, and especially under the circumstances of this case; that there is no evidence of any attention or care or diligence on the part of the landlord whatever, his theory being he is under no obligation to exercise any; that the attention of the landlord and his agent was called to the condition of the porch both before and after the lease, and the defect was of such character as would have led a reasonably prudent man to have seen the danger when he attempted to repair it, and that it was negligence not to make it safe after undertaking to work on it, and that there is liability on the part of the landlord

to the tenant, arising out of these facts and conditions, for which he is liable, and the judgment of the court below is affirmed with costs.

Judges Beard and McAlister dissent.

Of the Liability of the Landlord Letting Premises in a Defective and Dangerous Condition.

The principal case and the one preceding it apparently close a litigation which occupied the attention of the supreme court of Tennessee for some years without enabling all the judges thereof to concur in the result, and in which the majority affirmed in substance that a landlord is under an obligation, not resting upon contract, with respect to premises demised by him and by virtue of which he may become answerable both to his lessees and to strangers to the lease for injuries received resulting from negligence on the part of the landlord in not performing the duties which a majority of the court held rested upon him by virtue of his relation to the leased premises.

That, as a general rule, the doctrine of caveat emptor is applicable to the relation of landlord and tenant will not, we think, be seriously, or at all, denied. The only question is, what exceptions, if any, exist to the application of this doctrine. A landlord, in the absence of a covenant upon the subject, is under no obligation to make repairs upon the leased premises or to indemnify a tenant for injuries resulting from their being out of repair or in a dangerous condition, when this condition is equally apparent to the observation of both parties: *Purcell v. English*, 86 Ind. 34; 44 Am. Rep. 255; *Clifton v. Montague*, 40 W. Va. 207; 52 Am. St. Rep. 872; *Franklin v. Brown*, 118 N. Y. 110; 16 Am. St. Rep. 744; *Cowen v. Sutherland*, 145 Mass. 363; 1 Am. St. Rep. 460; *Davidson v. Fischer*, 11 Colo. 583; 7 Am. St. Rep. 267; *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438; *Fisher v. Lightall*, 4 Mackey, 82; 54 Am. Rep. 258; *Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775; *Perez v. Rabaud*, 76 Tex. 191; *Buckley v. Cunningham*, 103 Ala. 449; 49 Am. St. Rep. 42; *Little v. Macadaras*, 29 Mo. App. 332. There are cases which doubtless go somewhat further and which deny the right of the tenant to recover for injuries received from defects in the premises not apparent at the execution of the lease, where the landlord did not warrant the condition of the premises, and was not guilty of concealment or fraudulent conduct: *Blake v. Dick*, 15 Mont. 236; 48 Am. St. Rep. 671. It has also been held that the landlord does not owe to the lessee nor to the servants or employes of the lessee the duty of making an examination of the leased premises for the purpose of determining whether appliances used therein are in such a condition that no injury can result therefrom to the lessee or his employes from their being weakened by the use already made of them, if the lessee, by reasonable effort on his part, could have discovered and guarded against the danger as well as the lessor: *Whitmore v. Orono etc. Co.*, 91 Me. 297; 64 Am. St. Rep. 220. In the same state the

general rule upon the subject has been thus stated: "In the purchase of real, as well as of personal, estate parties make their own contracts, which the law construes and enforces. When one is negotiating for the lease of a dwelling-house, the same as when bargaining for a personal chattel, it is his privilege to inspect and ascertain for himself its actual quality and condition; and the parties make such express agreements relating thereto as they think fit. If the lessee, instead of exacting from the lessor any warranty of its present or future state of repair, elects to rely upon his own judgment, the law, in the absence of any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim *caveat emptor*, and he takes the premises as he finds them, for better or for worse. For the mere letting, without additional stipulations by the lessor, simply implies that he holds the title, and that the lessee shall quietly enjoy the use and occupation during his tenancy; and not that the premises are or shall be in any particular condition or state of repair, or that they are suitable for the purposes for which they are let. This general principle was, however, admitted to be "subject to an exception arising from a duty which the law, under certain circumstances, imposes on the lessor because of the relation subsisting between him and his lessee. For if, at the time of the letting, there is some latent or concealed defect in the premises, consisting of original structural weakness, decay, or infectious disease, which the lessor knows renders their occupation dangerous and is not known to the lessee or discoverable by his careful inspection, the law makes it the duty of the lessor to disclose it, and a failure to do so is actionable negligence if injury results." The court was of the opinion that as to a guest entering the property at the invitation of the lessee, the lessee, and not the landlord, was answerable for any injuries which might be received by such guest from accepting the invitation while the premises were in a dangerous condition: *McKenzie v. Cheetham*, 83 Me. 543. It has been said that though the landlord is aware of defects in the plumbing on the leased premises, he is under no obligation to disclose them to the intending lessee, and therefore is not answerable for injuries resulting from their not being disclosed, when the landlord does not, by any artifice or connivance, prevent the intending tenant from discovering defects, nor fraudulently misrepresent the condition of the property in some material particular when he claims special knowledge: *Blake v. Ranous*, 25 Ill. App. 486; *Coulson v. Whiting*, 14 Abb. N. C. 60.

It is conceded that where a defect exists in the leased premises which is not within the knowledge of the landlord nor ascertainable by him in the exercise of reasonable diligence, he is not answerable for injuries resulting to his tenants or others therefrom: *Metzger v. Schultz*, 16 Ind. App. 454; 59 Am. St. Rep. 323; *Marshall v. Heard*, 59 Tex. 266; *Henkle v. Murr*, 31 Hun, 28; *Schmalzried v. White*, 97 Tenn. 36. So, on the other hand, if the defect be of an obvious character equally open to the observation of all persons coming upon or dealing with the premises, the landlord is not more negligent than others in not discovering it, and the tenant, in accepting the prem-

ises with obvious defects, cannot recover of the landlord for injuries resulting therefrom: Davidson v. Fischer, 11 Colo. 583; 7 Am. St. Rep. 267; Bowe v. Hunking, 135 Mass. 380; 46 Am. Rep. 471; Eyre v. Jordan, 111 Mo. 424; 33 Am. St. Rep. 543.

We think, upon the whole, that there are few, if any, authorities necessarily inconsistent with the rules of law stated in the principal case and that preceding it, though doubtless judges have differed, and will again differ, as to whether a particular state of facts brings a case within those rules. The liability of landlords, so far as involved in these rules, does not rest upon contract, and therefore a recovery may be had in favor of persons injured by the landlord's negligence, with whom he has no contractual relations whatsoever, as in favor of guests of a tenant or of any other person upon the premises, whether by his invitation or not, provided they are there lawfully and are not guilty of contributory negligence on their part: Riley v. Simpson, 83 Cal. 217; Albert v. State, 66 Md. 325; 59 Am. Rep. 159; Reichenbacher v. Pahmeyer, 8 Ill. App. 217; Sternberg v. Wilcox, 96 Tenn. 163; Oxford v. Leathe, 165 Mass. 254; Wilcox v. Zane, 167 Mass. 302; Poor v. Sears, 154 Mass. 539; 26 Am. St. Rep. 272; Odell v. Solomon, 99 N. Y. 635.

The liability of landlords, when not founded upon contract, is based upon the theory that, independent of any contract, they have a duty to perform respecting premises owned by them, and that this duty exists in favor of all persons whom a landlord has reason to expect may rightfully come upon those premises, and may, while rightfully there, be injured by his negligence in not performing his duty: Payne v. Irwin, 144 Ill. 482. It is clear that if premises are in a condition which constitutes them a nuisance dangerous to the public or to the owner of adjacent property, it is the duty of the landlord to abate such nuisance before leasing the premises, and, if he leases them without doing so, he is answerable in damages to any person injured by the nuisance, even though the landlord did not himself create it; and the landlord may also be answerable whether he knows of the nuisance or not, provided he would have known of it had he exercised reasonable care with respect to his property: Timlin v. Standard etc. Co., 126 N. Y. 514; 22 Am. St. Rep. 845; Wunder v. McLean, 134 Pa. St. 334; 19 Am. St. Rep. 702.

It is also settled beyond controversy that if premises are in a condition in which they are liable to communicate a dangerous disease either to the lessee or to animals belonging to him, for the use of which the premises are leased, and this condition of contagion being known to the landlord, he fails to disclose it to the tenant, the latter may recover for injuries received by a contagious disease communicated to himself, to members of his family, or to animals for whose use the premises were leased: Cutter v. Hamlen, 147 Mass. 471; Minor v. Sharon, 112 Mass. 477; 17 Am. Rep. 122; Martin v. Richards, 155 Mass. 381; Eaton v. Winne, 20 Mich. 156; 4 Am. Rep. 377; Cesar v. Karutz, 60 N. Y. 229; 19 Am. Rep. 164.

The general law upon the subject which we are considering has been thus stated by the supreme judicial court of Massachusetts: "It is a general rule, well established by the decisions of this court, that

the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit. If, therefore, he is injured by reason of the unsafe condition of the premises hired, he cannot ordinarily maintain an action, in the absence of such warranty or of misrepresentation. The rule of caveat emptor applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe, and adapted to the purposes for which they are hired. There is an exception to this general rule, arising from the duty which the lessor owes to the lessee. This duty does not spring directly from the contract, but from the relation of the parties, and is imposed by law. When there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs. The principle that one who delivers an article which he knows to be dangerous to another ignorant of its qualities, without notice of its nature or qualities, is liable for any injury reasonably likely to result, and which does result, has been applied to the letting of tenements. It has thus been held that where one lets premises infected with the smallpox, and injury occurred thereby, he was liable if, knowing this danger, he omitted to inform the lessee: *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 122. This case proceeded upon the ground of the lessor's negligent failure to perform a duty which he owed the lessee; and it was not deemed important whether the omission to give the information was intentional or otherwise: See, also, *Bowe v. Hunking*, 135 Mass. 380; 46 Am. Rep. 471, and cases cited; *Tuttle v. Gilbert etc. Co.*, 145 Mass. 169"; *Cowen v. Sutherland*, 145 Mass. 363; 1 Am. St. Rep. 469.

In every case in which it is clear that the landlord knew of the condition of leased premises, and that such condition would probably inflict injury upon the tenant or others, and the latter did not know of such condition and remained ignorant of it, though he has exercised the care reasonably to be anticipated of a tenant, then the landlord is answerable for such damages as the tenant may sustain while in the exercise of due care from the imperfect, defective, or dangerous condition of the leased premises: *Archer v. Blalock*, 97 Ga. 719; *Hamilton v. Feary*, 8 Ind. App. 615; 52 Am. St. Rep. 485; *Coke v. Gutkese*, 80 Ky. 598; 44 Am. Rep. 499.

The principal case also declares that a landlord is liable, whether he knows of the defective condition of the premises or not if, by the exercise of due or reasonable care, he should have known of such condition. The cases deciding this precise question are not numerous, but, so far as they have fallen within our observation, they are in harmony with the principal case: *Albert v. State*, 66 Md. 325; 59 Am. Rep. 159. The question has been distinctly presented in Massachusetts, and the courts of that state have affirmed that ignorance on the part of the landlord does not necessarily make out

a defense in his favor; he must further show that such ignorance is consistent with the exercise of due care on his part: *Lindsey v. Leighton*, 150 Mass. 285; 15 Am. St. Rep. 199; *Gill v. Middleton*, 105 Mass. 477; 7 Am. Rep. 548; *Looney v. McLean*, 129 Mass. 83; 37 Am. Rep. 295.

WILSON v. STATE.

[100 TENNESSEE, 596.]

CRIMINAL LAW—DECEASED WIFE'S SISTER—THE OFFENSE OF BEGETTING AN ILLEGITIMATE CHILD ON THE BODY OF A WIFE'S SISTER cannot be committed after the decease of the wife. After such decease, the surviving husband and a sister of the deceased wife are, in contemplation of law, strangers.

Ownby & Lannon, for Wilson.

Attorney General Pickle, for the state.

596 BEARD, J. The plaintiff in error was convicted under an indictment charging him with a violation of section 6767 of Shannon's Code, which is in the words following, viz.: "If any person shall be guilty of begetting an illegitimate child on the body of his wife's sister, he is guilty of felony," et cetera.

597 The testimony in the case tending to prove that prior to the time of the illicit intercourse and the birth of the child charged in the indictment, the wife of the plaintiff in error, and the sister of the prosecutrix, had died, the counsel for the defendant below asked the court to say to the jury that, if they found this to be the fact, then it was their duty to acquit. The trial judge declined this request, and, on the contrary, said to the jury, "if they should find that the defendant did beget a child on the body of the sister of his wife, and the child so begotten was illegitimate, though his wife was dead at the time the act of illicit intercourse was committed, yet the defendant should be convicted."

The court was in error in declining the special request and in giving this general charge.

The offense created by this statute, and made the subject of punishment, is that of begetting a child upon the body of the sister of a living wife. This is the literalism of the statute, and the spirit is not broader than the letter. It recognizes an existing relation of husband and wife, out of which the relationship by affinity has grown. The person whom it seeks to protect against the approaches of the husband is the sister of his wife then alive. By marriage, the husband becomes the brother,

by affinity, of that sister, and the purpose of this legislation was to preserve the purity of this intimate relationship. But this relationship is terminated by the death of the wife: 1 Am. & Eng. Ency. of Law, 598 2d ed., sec. 9131. Thereafter the surviving husband and the surviving sister of the deceased wife, in contemplation of the law, are again strangers, and the statute in question has ceased to operate so far as they are concerned. On this ground it has been held that incest between a stepfather and a stepdaughter cannot be committed after the death of the stepdaughter's mother: *Johnson v. State*, 20 Tex. App. 609; 54 Am. Rep. 535. And so it has been held that a juror whose wife is dead is competent, although by his marriage he was related to one of the parties within the prohibited degree: *Goodal v. Thurman*, 1 Head, 208; *State v. Shaw*, 25 N. C. 533. And that the affinity which will disqualify a justice of the peace from sitting in a cause, must be a subsisting one at the trial: *Carman v. Newell*, 1 Denio, 26.

For the error indicated, the judgment is reversed and the case is remanded.

INCEST—RELATIONSHIP BY AFFINITY.—Incest between a stepfather and stepdaughter cannot be committed after the death of the stepdaughter's mother, for relationship by affinity ceases with the dissolution of the marriage creating it: *Johnson v. State*, 20 Tex. Ct. App. 609; 54 Am. Rep. 535. See note to *State v. Brown*, 21 Am. St. Rep. 796, 797.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

DAVIS v. STATE.

[87 TEXAS CRIMINAL REPORTS, 47.]

ROBBERY BY THREATENING TO DO ILLEGAL ACT.—
Under a statute providing that "if any person, by threatening to do some illegal act injurious to the character, person, or property of another, shall fraudulently induce the person so threatened to deliver to him any property with intent to appropriate the same to his own use," he shall be guilty of robbery, the act threatened must be illegal. A threat to accuse a person of an offense, and to prosecute him therefor, when such person is guilty of such offense and the person making the threat knows that he is guilty, although he may not have seen the unlawful act committed, is not a threat to do an illegal act, and the obtaining of money from the accused by reason of such threat, is not robbery under such statute.

Lattimore & Roy, for the appellant.

M. Trice, assistant attorney general, for the state.

48 HENDERSON, J. Appellant was convicted of robbery, under article 857 of the Penal Code of 1895, and given two years in the penitentiary; hence this appeal. The statute on this subject provides: "If any person by threatening to do some illegal act, injurious to the character, person, or property of another, shall fraudulently induce the person so threatened to deliver to him any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary, not less than two nor more than five years." A number of assignments of error are contained in the record, but we will only notice such as we deem necessary to a proper decision of this case. The testimony for the state tends to show that the prosecutor, Little Allright, on the night in question, had taken a room at the house of a lewd woman in Fort Worth, and that he had a pistol, and while there displayed the same.

He put it under the head of the bed, and subsequently was awakened by the appellant, who had taken the pistol from under the head of the bed and accused prosecutor of carrying the same, and made him get up. He told the prosecutor that he was going to carry him to jail, and told him that he would turn him loose if he would pay him fifteen dollars. The prosecutor finally agreed to pay him five dollars, and paid two dollars and fifty cents, and agreed to pay him two dollars and fifty cents the next day at a point designated; that the defendant was to give him his pistol at that time. The prosecutor met defendant at said place, and paid him the two dollars and fifty cents, but the defendant said he did not have the pistol. Appellant himself testified that he saw the prosecutor with the pistol that night in the room with Rosa Allen, while concealed behind the wardrobe, and the prosecutor at that time flourished the pistol around; that he crawled under the bed and went to sleep. After both the parties were asleep, defendant took Allright's pistol from under his head, and told him he was going to carry him and turn him over to the officers, and he would about go to jail, or the calaboose, and he begged the defendant not to do so; that he did not receive any money from the prosecutor and offered to restore him his pistol, but the prosecutor told him he did not want it, as it had gotten him into too much trouble already. The court charged ⁴⁹ the jury, in substance, that if prosecutor carried the pistol in the presence of the defendant, he, as a private person, had the right to arrest him and take him before the nearest magistrate, and, if he did no more, then to acquit him. The court further charged the jury that, "if the defendant did threaten to arrest or to accuse and prosecute one Little Allright for or on the charge of unlawfully carrying a pistol on or about his person, and that the said Little Allright had not then or theretofore unlawfully carried a pistol in the presence of the defendant, and you further find from the evidence that the defendant, by such threat, did fraudulently induce the said Allright to deliver to the defendant two dollars and fifty cents in money, to find him guilty." And further instructed the jury that, "if they believed that the defendant threatened to place the said Little Allright in jail, and that by means of such threat to place him in jail, did fraudulently induce the said Little Allright to deliver to him, the said defendant, the said two dollars and fifty cents in money, to find him guilty." Now, the appellant objects to these charges on the ground that the court took from the jury the right to pass upon whether or not the acts stated

were injurious to the character, person, or property of the prosecutor. While we believe that the court has a right to assume that an illegal placing of a person in jail, or a threat to place a person in jail, is injurious to the person and character of such party, on the other hand, the threat to do these things, if they were legal, is not a threat to do some illegal act injurious to the character, person, or property of another. If the proof shows, and there was testimony in the case tending in that direction, that appellant saw the prosecutor, Allright, carrying a pistol, and the proof further showed that he was a peace officer, which in this case it does not do, unquestionably appellant, under such circumstances, had the right to arrest the prosecutor and take him before the nearest magistrate. The appellant, however, cannot complain because the court gave him authority to make an arrest, which in our opinion, under the statute, pertains solely to a peace officer; that is, the charge of the court in this respect gave him the same right to make an arrest as if he was at the time a peace officer. The court, however, in this connection, in effect, instructed the jury that, if the defendant threatened to accuse and prosecute Allright for the unlawfully carrying a pistol, unless the said Allright had carried the pistol in his presence, his threat was to do an unlawful act; and, if by such threat, he induced the said Allright to deliver to him the said two dollars and fifty cents, to find him guilty. Now, we do not understand that the threat to accuse a person of an offense and to prosecute a person for an offense, when such person is guilty of that offense, and the party making the threat knows he is guilty, although he may not have seen the unlawful act committed, is a threat to do an illegal act. As we understand the statute, the act threatened must, in itself, be an unlawful act. If the obtaining of the property is by threatening to do an act perfectly legitimate, there is no offense committed. So it follows, if the appellant had a legal right to accuse and to prosecute Allright on information for carrying a pistol, ⁵⁰ his threat was not to do an illegal act, and the statute says that the act must be illegal. In the view we take of it, the evidence certainly established that, if appellant did not actually see Allright carrying the pistol, he knew from information that he was carrying it; and the fact that he was illegally carrying a pistol cannot be gainsaid. So the appellant had a legal right to accuse and prosecute Allright for carrying said pistol, although he may not have seen it, and his threat to so accuse and prosecute was not a threat to do an ille-

gal act, and the obtaining of money thereby was not robbery under this article of our Penal Code. The court committed error in instructing the jury that it was robbery. It is not necessary to discuss the other assignments of error.

The judgment is reversed, and the cause remanded.

ROBBERY—FEAR INDUCED BY THREAT OF PROSECUTION.—In England, and perhaps in this country, in the absence of statute, a threatened charge of sodomy is the only threat of prosecution for a crime from which can be inferred the fear necessary to constitute the crime of robbery; but in some states obtaining money by threats is made a substantive offense: See monographic note to *State v. McCune*, 70 Am. Dec. 186-188.

BROWN v. STATE.

[37 TEXAS CRIMINAL REPORTS, 104.]

FALSE PRETENSES—SWINDLING BY MEANS OF CHECK.—AN INDICTMENT for swindling by means of a check, alleging that the accused falsely represented that he had a specified amount on deposit in a certain bank subject to his order, and that he had credit at such bank for a specified additional amount, and that his check would be paid upon presentation at such bank, is sufficient to charge the crime of swindling.

FALSE PRETENSES.—SWINDLING by false pretenses may be committed by means of acts and conduct alone, without any verbal assertion or representation of a fraudulent nature.

FALSE PRETENSES—SWINDLING BY MEANS OF CHECK.—The mere fact of drawing a check on a bank in which the drawer has no money, funds, or credit, is not a fraudulent representation that he has funds or credit in such bank, and does not alone constitute the offense of swindling.

FALSE PRETENSES—SWINDLING—EVIDENCE.—Under an indictment for swindling by means of a check, evidence that the accused presented to the party swindled a certificate of deposit in one bank for a large amount, but represented that it was partnership money, and that he preferred to give his personal check upon another bank where he had a deposit and upon which he gave a check, is admissible, as is also evidence of his status with both banks.

M. Trice, assistant attorney general, for the state.

¹⁰⁴ **DAVIDSON, J.** Appellant was convicted of swindling, and obtaining thereby personal property in an amount exceeding \$50 in value, and given ten years in the penitentiary; hence this appeal. The indictment charges that defendant obtained a diamond ring, of the value of \$280, and a diamond pin, of the value of \$220, from the prosecutor, in consideration of the following check or writing obligatory:

"No. 3.

Kansas City, Mo., Aug. 26, 1896.

"Missouri National Bank, pay to J. E. Mitchell, or order,
\$500.00, five hundred dollars.

J. W. BROWN.

"Union Bank Note, K. C., Mo."

The representations set forth in the indictment in connection therewith are substantially as follows: That he (the said J. W. Brown) was then and there the owner and had the right to dispose of said check, and that he falsely and fraudulently represented to said Mitchell that said check was a legal and valid obligation, and that he (said Brown) had the right and authority to draw and ¹⁰⁵ dispose of the same, and that he had money to the amount of \$500 on deposit in said Missouri National Bank, subject to his order, check, and disposal, and that he had credit at said Missouri National Bank to the extent of \$500, and that said written instrument and check would be paid by said Missouri National Bank whenever presented there for payment, et cetera. In our opinion, the indictment is sufficient in this respect to charge the offense of swindling under our statute. If, on the trial, evidence was given to sustain either allegation of the indictment in connection with said check, to wit, that he (said Brown) had money to the amount of \$500 on deposit in said bank, subject to his order, et cetera, or that he had credit at said Missouri National Bank, et cetera, to the extent of \$500, and that said check would be paid when presented to said bank, and the evidence should further show that these representations were false, the state's case would be made out. But the evidence simply showed, in effect, that defendant came to the jewelry store of the prosecutor, and first bought a ring for \$175, and gave the prosecutor a check for that amount, but afterward, on the same day, returned to the store, bringing the ring back, stating that he desired to exchange it. The defendant then selected a diamond ring and a diamond pin, and asked prosecutor what he would take for both, and was told that he could have the ring for \$280 and the pin for \$220, and he agreed to take them at that price, and they were delivered to him. Defendant then asked prosecutor for the check which he had given for the ring in the morning, and prosecutor gave it to him. Defendant then gave prosecutor a check for \$500 for the ring and pin, said check being the same as set out in the indictment. At the time, defendant showed prosecutor a certificate of deposit in the First National Bank of Fort Worth for \$20,225, and stated that he could give him a check on that bank, but that was firm money, and he preferred to give a check

on his own personal account with the Missouri National Bank of Kansas City, Missouri. Prosecutor testified that he parted with the possession and title of the diamond ring and pin to the defendant wholly upon the strength and by reason of the \$500 check which defendant gave in payment therefor, and relied upon said check for payment for said diamond pin and ring. On this subject the court charged the jury, at the instance of the state as follows: "The jury are charged that in a case of swindling it is not necessary that the pretenses, devices, and fraudulent representations should be in words. There may be a sufficient false pretense and device and fraudulent representation in the acts and conduct of the party, without any verbal representations of a fraudulent nature. The mere act of giving a check is a representation that the drawer of the check has sufficient funds on deposit with the drawee, or sufficient credit with such drawee, to give such a check, and that the same will be paid when presented to such drawee." The defendant saved a bill of exceptions to this charge, and assigns the same as error. The first portion of this charge, as an abstract proposition of law, is correct, to wit, false pretenses may consist in acts. Mr. Wharton says (see 2 Wharton's Criminal Law, sec. 1170): "The conduct and ¹⁰⁶ acts of the party will be sufficient, without any verbal assertion." He cites several illustrations—among others, that of a person who assumed the garb of an Oxford University student and by such garb and conduct represented himself as a student of said university, and so obtained goods. It was held that the false pretenses were complete, though not a word passed as to his status. And this doctrine is announced by our own court in the case of Blum v. State, 20 Tex. Crim. App. 578, 54 Am. Rep. 530, cited by the assistant attorney general. That was a case of a merchant who had formerly dealt with the prosecutor, and had represented to him that the business was his own. On the day of the alleged swindle, at 12 o'clock, the defendant, Blum, secretly sold out his business to his wife and daughter, and thereafter purchased goods of the prosecutor to the amount of about \$90. The court in that case say "that no false pretenses in words were made by the appellant, for he was not present in person, and none are shown to have been made by the wife and father in law of appellant, who acted as his agents in the purchase of the goods, that Goodman, the prosecutor, may have entertained the opinion that the appellant still owned the property in the bakery and grocery, and made the sale upon the belief that he still owned said property. But this did not affect

the question, unless the acts of the parties in purchasing the goods induced that belief at the time. It was simply an error of opinion upon the part of the prosecutor in parting with his goods, and the knowledge of the fact that he was acting upon such belief or opinion, without correcting it, will not subject the defendant or his agents to a charge of having made a false pretense by withholding the information which would have corrected that belief. It was his own opinion as to the existence of a fact which did not exist, and not the acts, declarations, or representations of the parties with whom he was trading, which caused him to be deceived." In that case it was held that the principle above announced did not apply, and that there were no such acts and conduct as constituted a fraudulent representation. Mr. Bishop (2 Bishop's New Criminal Law, sec. 421) cites the following case from the English courts: Where a prisoner was charged with falsely pretending that the postdated check given by himself was a good and genuine order for £25 and of the value of £25, whereby he obtained a watch and chain, and the jury found that, before the completion of the sale and delivery of the watch by the prosecutor to the prisoner, he represented to the prosecutor that he had an account with the bankers on whom the check was drawn, and that he had a right to draw the check, though he postdated it for his own convenience, all of which were false, and that he represented that the check would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, or that he had the funds to pay it, he was held to be properly convicted: 2 Bishop's New Criminal Law, sec. 421; 2 Wharton's Criminal Law, sec. 1163. In this case, it will be seen that the instrument was in the nature of an after-promise; but it will also be observed that, in connection with said instrument, there was a present representation of an existing fact which was, to wit, ¹⁰⁷ that he had an account with the bank on whom the check was drawn, and that he had a right to draw the check. In a note to these cases, *Lesser v. People*, 73 N. Y. 78, is cited. In that case the prisoner passed a check on the prosecutor drawn by one Stineback, that was represented by the defendant at the time to be a valid security, and that it was postdated because it was so late in the day, and the bank was closed. No account was kept at said bank by the said Stineback, and it was held in that case that the representations constituted a false pretense.

We have examined the authorities accessible to us at this point, and have found no case where the mere drawing of a

check on a bank, in which the defendant has no funds and has no credit, will constitute the offense of swindling, and we believe no well-considered case will be found holding such to be the case. In the case of *Martin v. State*, 36 Tex. Crim. Rep. 632, this court held that the drawing of a check, and passing the same, and the statement in connection therewith that the payee would have no trouble in getting his money, was not equivalent to representing that he then had money in said bank, or that he was authorized to draw against it; and the doctrine was there announced that the mere drawing of a check on a bank, in which the drawer had no money or credit, was not a false representation to the effect that the drawer did have funds in said bank, or that he did have credit in said bank, and that this fact alone did not constitute the offense of swindling in our state. This was followed in *Ayres v. State*, 37 Tex. Crim. Rep. 1. It frequently happens that men in business draw checks or drafts upon banks or upon individuals in whose hands they have no funds and with whom they have no credit. They make no representations in regard thereto; they are asked no questions on the subject; and to hold that the mere drawing of such a check, where the party has no funds, is a fraudulent representation, constituting the offense of swindling, we think would be going too far. There may be cases in which, in connection with such act of drawing a check, the conduct and acts of the party are such as to amount to a fraudulent representation that the party has funds or credit in said bank, and so, under such circumstances, the offense may be made out. We would not be understood as holding that there may not be such cases, but we do hold that the mere fact of drawing a check on a bank in which the drawer has no money, funds, or credit, is not a fraudulent representation that he has funds or credit in said bank, and will not alone constitute the offense of swindling; and such we understand to be the charge of the court as applied to this case. In our view, the charge of the court was error. Notwithstanding the former decisions, heretofore alluded to, on this subject, we have been induced to further examine the authorities, in order more fully to present our views on this question. We do not believe, under the facts and circumstances of this case, the court erred in admitting the testimony in regard to the status of the defendant's account with the Missouri National Bank, nor in admitting the testimony in regard to defendant's alleged deposit, with the ¹⁰⁸ national bank in Fort Worth. It is not necessary to discuss other assignments.

For the error discussed, the judgment is reversed, and the cause remanded.

FALSE PRETENSES—ESSENTIALS OF CRIME—GIVING WORTHLESS CHECK.—An essential element of the offense of obtaining property by false pretenses is, that the person who parts with it is, in fact, defrauded to his injury. In addition to the false pretenses, there must be an intent to defraud. The pretenses must be used for the purpose of perpetrating the fraud, and a fraud must be actually accomplished by means of the false pretenses: *State v. McCormick*, 57 Kan. 440; 57 Am. St. Rep. 841. The crime is constituted where one draws a check in favor of another in payment for property obtained, knowing at the time that at the bank upon which it is drawn he has no funds to meet it, and that it will not be paid upon presentation: See monographic note to *Barton v. People*, 25 Am. St. Rep. 380; *State v. McCormick*, 57 Kan. 440; 57 Am. St. Rep. 841, and note.

KIMBALL v. STATE.

[37 TEXAS CRIMINAL REPORTS, 230.]

WITNESSES—CORROBORATION.—If a witness testifies on a trial to a fact, and the opposing side shows, or attempts to show, that he made conflicting statements about that fact, the party introducing such witness can prove that he made a similar statement soon after the transaction occurred.

EVIDENCE OF OWNERSHIP.—On a trial for theft, where it is proved on the part of the prosecution that, at the time of the sale of the animal alleged to have been stolen, the accused stated that it belonged to him, he is entitled to prove that a woman claimed the ownership of, and authorized him to sell, the animal, that she was proposing to sell it to others, and that after he sold it she proposed to refund the money. These facts are admissible, whether the accused has testified or not, or whether the statements of the woman were made before or after the taking by the accused.

Miller & Williams, for the appellant.

M. Trice, assistant attorney general, for the state.

230 DAVIDSON, J. Appellant was convicted of cattle theft under the first count in the indictment, and given two years in the penitentiary. The indictment contains three counts; the first charging theft of property from R. A. Williams, who was then and there holding it for Pete Cameron, the real owner. The second count charges theft of the cow from Pete Cameron. The third count charges receiving and concealing stolen property, knowing it to have been stolen. The court submitted only the first count to the jury, ignoring the other two. The state's case, under the facts, in substance is as follows: That defendant came to one Carter, a livestock commission broker in the city of Dallas, and informed him of the fact that he had a cow or

heifer which he desired Carter to sell for him; that the cow belonged to a woman, for whom he was selling it; that the woman was separated from her husband, and desired defendant to sell this animal for her. Carter negotiated a trade with Gillespie for the sale of the animal, and the defendant consummated the sale to Gillespie, receiving nine dollars and twenty-five cents in payment. Gillespie swears that the defendant told him at the time of the sale of the animal that it was the property of him, the defendant. It will be seen, then, that the state relied for a conviction upon the fact that the defendant had possession and disposed of the animal, supplemented by the contradictory statements with regard to that possession as shown by the witnesses, Carter and Gillespie. The defendant testified in his own ²³¹ behalf that he, as agent of Mrs. R. A. Williams, from whom he received the cow, brought the cow to town, secured the services of Carter to make the sale, and afterward sold her to Gillespie. He also testified that Mrs. Williams gave as a reason for securing his services to sell the animal that her husband would not furnish her with clothing, and she desired to sell this animal in order to obtain necessary clothing for her person. He denied claiming ownership in the animal at all times, as well as in his conversation with Gillespie. The state, in rebuttal, proved by Mrs. R. A. Williams that she did not authorize the defendant to sell the animal, and gave him no authority to do it, never had any conversation with him about it, and knew nothing of the transaction. The evidence also shows that the animal was the property of Pete Cameron, the alleged owner, but was in the possession of R. A. Williams, the husband of Mrs. R. A. Williams; and there is some testimony indicating that the possession of the animal was in both R. A. Williams and his wife, and it is shown that she fed and looked after the cow, and it gave her a great deal of trouble. The defendant offered to prove by several witnesses that about the time of, and just previous to, the taking of said animal, they had a conversation with Mrs. Williams, in which she stated, in substance, the same facts testified by the defendant; and, in substance, that he made the same statement to them that he made to the witness Carter at the time he secured his services to negotiate the sale. All this testimony was excluded by the court. We deem it unnecessary to go into the particulars of these statements. The defendant reserved his bills of exception to these rulings of the court, which are all properly presented by the record. This testimony was offered to contradict Mrs. Williams, in part, but main-

ly in corroboration of the defendant's statement made at the time he was in possession of the animal, and at the time he was securing the services of Carter to negotiate the sale. As before observed, his possession of the property in a day or two after it disappeared from its accustomed range was the main fact relied upon by the state for conviction. The excluded testimony should have been admitted. Where a witness testifies on the trial to a fact, and the opposing side shows, or attempts to show, that he made conflicting statements about that fact, then the party introducing the witness can prove that he made a similar statement soon after the transaction occurred: See *Goode v. State*, 32 Tex. Crim. Rep. 505, and cited authorities, and *Campbell v. State*, 35 Tex. Crim. Rep. 160. The state proved by the witness Carter that the defendant stated the property belonged to a woman, and he was selling it for her. The state proved by Gillespie that at the time of the sale the defendant stated that the animal belonged to him. Under this state of case, appellant had a right to prove that he had been authorized by a woman to sell the cow, or that the woman was trying to sell the cow, and that she proposed to refund what she had received for the cow. These facts were admissible, independent of the question whether or not appellant testified in the case. And these facts, when offered by the defendant ²³² through the mouth of several witnesses, by whom he expected to prove them, should have been admitted; and this is true whether these statements of Mrs. Williams were made before or after the taking. The defendant also proposed to prove that Mrs. Williams sought to sell the animal to other parties, and also to secure the services of one or more parties to sell the same animal, before applying to the defendant. This was also admissible. Because of the error of the court in refusing to admit the testimony offered by appellant, as above discussed, the judgment is reversed, and the cause remanded.

WITNESSES—IMPEACHMENT—CORROBORATION.—When a witness is sought to be impeached by proof of former statements, inconsistent with his testimony at the trial, it is competent for the party or prosecutor who has introduced him to prove other consistent statements for the purpose of corroborating him; and as soon as the intention to introduce the discrediting testimony is announced, it becomes proper to bring forward the confirmatory evidence: *State v. George*, 8 Ired. 324; 49 Am. Dec. 392, and note; *Johnson v. Patterson*, 2 Hawks, 183; 11 Am. Dec. 756, and extended note; *State v. Vincent*, 24 Iowa, 570; 95 Am. Dec. 753, and note.

COSGROVE v. STATE.

[87 TEXAS CRIMINAL REPORTS, 249.]

ADULTERY AND FORNICATION—INDICTMENT—SUFFICIENCY OF.—Under an indictment for adultery, with proper allegations, a conviction can be had, under proper evidence, for fornication. It is a question of allegation, and not as to whether one offense includes the other; but in such case all the elements of fornication must be charged to support the conviction.

FORNICATION.—INDICTMENT for fornication, which fails to allege that both parties to the offense were unmarried, is fatally defective. Hence a conviction for fornication cannot be had under an indictment for adultery alleging that the man has a wife living, although such allegation is untrue.

S. H. Russell, for the appellant.

N. P. Jackson and M. Trice, assistant attorney general, for the state.

256 **HURT, P. J.** Appellant was charged with adultery, and convicted of fornication. Counsel for appellant contends that a conviction for fornication cannot be had under an indictment for adultery, and especially under this indictment. It is well settled in criminal procedure at common law, in other states and in this state, that under an indictment for adultery, with the proper allegations, a conviction can be had, under proper evidence, for fornication. The question is not whether one offense includes another. It is a question of allegation. The legislature cannot, by enacting that a certain offense includes another offense, relieve the state of the necessity of inserting in the indictment every allegation necessary to make a good indictment for the offense of which the accused has been convicted. In other words, all of the elements of the offense must be charged, to support the conviction. Tested by these well-settled rules, after eliminating the allegation in this indictment, to wit: "Ben Tucker being then and there lawfully married to another person then living," does the remainder contain all of the necessary elements of fornication? Without this allegation, the charging part of the indictment would read as follows: "That Melissa Cosgrove did unlawfully live together and have carnal intercourse with Ben Tucker, a man; and the grand jurors aforesaid, on their oaths aforesaid, do further say and present in said court that in Ellis county, on January 1, 1895, Melissa Cosgrove, a woman, did unlawfully have habitual carnal intercourse with Ben Tucker, a man, against the peace and dignity of the state." "Fornication" is defined as follows: "Fornication is the living together and carnal intercourse with each other, or habitual in-

tercourse with each other without living together, of a man and woman, both being unmarried." An indictment for this offense, omitting to allege "both being unmarried," would be fatally defective. Why? Because the parties may have been man and wife, but if they were both unmarried they certainly could not be. The allegation in this indictment that Ben Tucker had a living wife sufficiently ²⁵⁷ negatives the fact that he was the husband of the appellant, but, being untrue, it leaves the indictment without this fact being denied anywhere therein.

The judgment is reversed, and the cause ordered dismissed.

ADULTERY—FORNICATION—WHETHER INCLUDED WITHIN.—Fornication is the essential fact constituting crimes arising out of illicit carnal connection, and is included within them: *Dinkey v. Commonwealth*, 17 Pa. St. 126; 55 Am. Dec. 542. Adultery is sexual intercourse of a married woman with any man other than her husband; fornication is the like intercourse of an unmarried woman with any man: *Hood v. State*, 56 Ind. 263; 26 Am. Rep. 21, and extended note. In New Jersey, it has been held that on an indictment for adultery the defendant cannot be found guilty of fornication: *State v. Lash*, 1 Harr. 380; 32 Am. Dec. 397.

HILL v. STATE.

[57 TEXAS CRIMINAL REPORTS, 279.]

ASSAULT—INTENT TO INJURE—INSTRUCTIONS.—On a trial for aggravated assault by an adult male upon a female child about eight years of age, by holding her between his legs with his privates exposed, and making indecent proposals to her, while she attempted to get away, and entreated him to let her go, it is proper to charge the jury that, in order to convict, they must believe that the accused intended to injure the girl, and further, in the words of the statute, that "where an injury is caused by violence to the person, the intent to injure is presumed, and it rests upon the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind."

ASSAULT—CONSENT OF CHILD.—A conviction for an aggravated assault by an adult male upon a female child eight years of age may be sustained without any proof of the want of consent of the child, or instruction in relation thereto. An assault committed upon a child of such tender years is criminal, whether with or without her consent, as legally she has no will either to resist or to consent, and there may be an actual submission of such child without constituting legal consent.

ASSAULT—EVIDENCE OF AGE OF FEMALE.—Under an indictment charging an aggravated assault by a male upon a female, evidence is admissible to prove the age of the female, although that is not alleged in the indictment.

Browning and Madden, for the appellant.

M. Trice, assistant attorney general, for the state.

²⁸⁰ HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of twenty-five dollars, and he appeals. The evidence on the part of the state shows that defendant was an adult male, and that, on or about the date alleged in the indictment, Maggie Walsh, a little girl about eight years of age, came into his shop. No one was present at the time, and she states that "he went around behind the red thing that was in the shop, and sat down on a box, and ²⁸¹ caught me, and held me between his legs. He had his penis out, and I saw it. I tried to get loose and told him to let me go. He held me there about five minutes, and let me loose. My back was to him. His pants were unbuttoned, and his penis was out, and hanging down, and he said: 'I have shown you mine; now show me yours.' He gave me an orange and a nickel, and told me not to tell anybody about it." On cross-examination she said: "When defendant caught me, I was standing around behind that red thing. He was sitting on a box. He just caught me, and pulled me down—caught me with his hands. He held me with his hands around me. While he held me, I was standing between his legs. He never said anything while he was holding me. When I got loose, I turned around, and saw his pants unbuttoned, and his penis hanging down, and he then said: 'I have showed you mine; now show me yours.' While he held me he did not try to lift my clothes. He did not touch my privates. He did not put his hands on my legs; he only held me." This was all the testimony on the part of the state as to the act upon which this prosecution was based. The defendant, by his evidence, denied that anything of the kind as stated by the prosecutrix occurred. The court instructed the jury as follows: "You are further instructed that, when an injury is caused by violence to the person, the intent to injure is presumed, and it rests upon the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind." Appellant objected to this charge, as stated by him, "because the evidence did not warrant the charge, there being no evidence to show any injury to the person of Maggie Walsh by the defendant, either by bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind, and because it was calculated to make the impression on the jury that there had been an injury inflicted, and was calculated to lead the jury to believe that it devolved upon the defendant to show an accident or innocent intent, when in fact no injury had been committed requiring such show-

ing on his part." This charge was given in connection with the main charge, defining an assault, and is in the very language of the statute (Pen. Code, art. 588), and, when considered in connection with the main charge, was not calculated to mislead the jury, because the court required the jury to find beyond a reasonable doubt that the accused intended to injure the prosecutrix. The language of the charge is as follows: "You are charged that if you believe from the evidence that the defendant did upon the person of Maggie Walsh commit an assault, by making use of any violent or indecent familiarity toward or upon her, with intent to injure her, or that he indecently and violently fondled and handled her person with intent to injure her, then you must find him guilty; and, on the other hand, if you do not so find and believe, you will acquit him." We think there is enough in this case to show that the assaulted party, the little girl, Maggie Walsh, was held by the defendant against her ²⁸² consent. In her testimony she speaks of him "holding" her. Now, she does not say in so many words that she did not give her consent. Still, she states that she tried to get loose; that she told him to let her go. It is not claimed that he had any right to constrain or hold her against her will. The circumstance, the exhibition of his person, his remarks—all show that his acts were calculated to produce a sense of shame or other disagreeable emotion of the mind in a person of even the tender years of Maggie Walsh. While she does not state that this was the effect, her conduct, as testified to by herself, indicates this. He gave her an orange and a nickel and told her not to tell anybody about it. This was an attempt on the part of a grown man to tamper with, pervert and degrade a little girl; and, in our opinion, it was an assault committed against her will, and under circumstances which produced in her a sense of constraint and shame. The court did not err in giving the charge in question. The remarks heretofore made apply to the defendant's second bill of exceptions, and also to the refusal of the court to give appellant's requested charge. Although the defendant denied the assault, the jury believed the statement of Maggie Walsh, and found the defendant guilty; and we see no reason for disturbing their verdict.

The judgment is affirmed.

ON MOTION FOR REHEARING.

HENDERSON, J. Appellant was convicted of an aggravated assault, and appealed; and at a former day of this court the judgment was affirmed. Appellant now brings the case be-

fore us on motion for rehearing, and suggests that this court overlooked his second and third bills of exceptions. The portion of the charge of the court involved in the second bill of exceptions is as follows: "You are charged that if you believe from the evidence that the defendant did, in Donley county, Texas, on or about the third day of July, 1893, on the person of Maggie Walsh commit an assault, by making use of any violent or indecent familiarity toward or upon her, with intent to injure her, or he indecently or violently fondled her person, with intent to injure her, then you must find defendant guilty." In this connection appellant requested the following charge: "It is not enough that defendant handled Maggie Walsh against her consent, but you must find and believe from the evidence, beyond a reasonable doubt, that he violently and indecently handled or fondled her against her consent, with the intent to injure her, before you are authorized to find defendant guilty; and, if you do not so find and believe, you will acquit the defendant." Appellant insists that if an adult male violently or indecently handles or fondles the person of a female, with her consent, with the purpose of having carnal intercourse with her, he does not commit an indecent or aggravated assault, and that the effect of the instruction of the court was to tell the jury that such was an assault; that before such acts of violent or indecent ²⁸³ handling of the person of a female, with intent to have carnal intercourse with her, can be an assault, it must be proved to have been without her consent and against her will. And he insists that the proof in this case clearly raised the question, as there was no positive evidence that the alleged assaulted female did not consent to the acts of fondling committed by the defendant; that there was proof tending to show that she was consenting to his acts; and that the court should not have given the charge in question, but should have given the charge as presented by the defendant. The indictment in this case charges that the defendant was an adult male, and that he committed an assault upon Maggie Walsh, who was then and there a female, saying nothing as to her age. We do not understand appellant in this case to controvert the proposition that the state could make proof that the alleged injured female was of tender years, although no such allegation was contained in the indictment; but we do understand him to urge that notwithstanding this, and no matter of how tender years the prosecutrix was, she was capable of consenting to the acts of appellant, and consequently there could be no offense committed

by him upon her, she consenting to such acts. We do not believe that such is the rule. Mr. Bishop, in speaking on this question of consent as applied to rape, uses this language: "If in this case consent is obtained by fraud, or if the person, from tender years or other cause, is incapable of consenting, or if, without absolute fraud or actual incapacity, the will is overpowered, et cetera, the law deems there was no consent": See 1 Bishop's New Criminal Law, sec. 261. And again, in speaking on the question of assault, and the effect of consent and the force used, we make the following citations: "The apparent consent of a child of very tender years, too immature to consent, will not necessarily be an answer to a charge of an assault. Overpowering the will of the injured person does not avail the other, and in some circumstances slight acts will be sufficient proof to deem that it was overpowered. If a schoolmaster take indecent liberties with a female pupil, who does not resist, her tender years and relative subjection to him may justify a jury heeding her testimony that what was done was really against her wishes, in pronouncing him guilty": See 2 Bishop's New Criminal Law, secs. 35, 36. In *Cliver v. State*, 45 N. J. L. 46, this question is discussed. We quote therefrom as follows: "By the fifth request, the court was asked to charge that, in order to convict, under the count for assault, the evidence must satisfy the jury that the accused committed the alleged indecent act against the will of the child." This the court refused to charge, and in such refusal there was no error. An act such as charged in that count, committed upon a child of such tender years, is criminal, whether with or without her consent. Legally, she has no will to resist or consent. There may be actual submission of a child, without constituting legal consent: *Regina v. Day*, 9 Car. & P. 722. That case applies directly to the question now before the court. Counsel for the prisoner in that case contended that, the count being for assault, consent or nonconsent on the part of the girl, ²⁸⁴ although she was of tender years, was material; and that, as she offered no resistance, but submitted quietly, it must be taken that she was consenting to the act; and that the prisoner should be acquitted. But the court refused so to charge, and said that the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such consent as will justify the person in point of law." The charge above asked and refused was upon a count charging the defendant with an indecent assault. It is not controverted that it was admissible to show,

under the allegations of the indictment charging an aggravated assault by an adult male upon a female, that the age of the female could be shown. This was shown, and the testimony is not gainsaid that she was only eight years old. The acts proved, as said in the previous opinion, showed an indecent handling and fondling by appellant of said female. The little girl was the only witness introduced on this branch of the case, and her testimony suggests not only an indecent fondling, but, it occurs to us, was entirely against her will and consent. Appellant does not testify on this point at all; he directly denies the entire transaction, stating that nothing of the kind occurred. But, even if it be conceded that there was testimony pro and con, some presenting the idea that she consented, and some that she did not consent, yet we hold that, in the face of the proof that she was eight years old, she was of such tender years as that she could not consent—that is, that she was of such tender years as that she could not consent to the indecent handling of her person by appellant; and that, consequently, the court did not err in submitting to the jury that portion of the charge complained of, and in refusing to give the requested instructions of the defendant on this subject.

The motion for rehearing is overruled.

ASSAULT—ESSENTIALS—AGE OF CHILD ASSAULTED.—To constitute an assault there must be an intentional attempt to do injury to the person of another, and such attempt must be coupled with the present ability to do the injury attempted: *Klein v. State*, 9 Ind. App. 365; 53 Am. St. Rep. 354, and note. An assault usually implies force by the assailant and resistance by the assailed. If, however, the latter is made incapable of consent, the act may constitute an assault though she did not resist, but, on the contrary, consented: *People v. Verdegreen*, 106 Cal. 211; 46 Am. St. Rep. 234. Taking indecent liberties with a female child under the age of consent is an assault, notwithstanding the fact that she consented: Extended note to *McGuff v. State*, 16 Am. St. Rep. 30. See monographic note to *Smith v. State*, 80 Am. Dec. 365, 374. Compare *State v. Pickett*, 11 Nev. 255; 21 Am. Rep. 754; *Smith v. State*, 12 Ohio St. 466; 80 Am. Dec. 355.

MALLORY v. STATE.

[37 TEXAS CRIMINAL REPORTS, 482.]

EVIDENCE — HEARSAY — IDENTITY. — Evidence by an officer making an arrest, that he obtained from others a description of the party who committed the crime, and that it was upon the description given him by such parties that he afterward arrested the accused, is inadmissible, it being hearsay and also calculated to injure the rights of the accused.

FORGERY—EVIDENCE OF OTHER SIMILAR CRIMES.—On a trial for forgery, evidence is admissible to show that the accused has passed other forged instruments.

FORGERY—EVIDENCE TO SUPPORT ALIBI.—If, on a trial for forgery, witnesses have testified that they saw the accused write the name upon the alleged forged instrument, and the accused has testified that he did not write such name, and he relies upon an alibi, a letter written by him to his sister before the accusation for which he is on trial, and returned to him, if sufficiently identified by him as being in his handwriting, is admissible in evidence to disprove his presence at the time and place of the passing of the instrument in question, and to show that his genuine handwriting is not the same as that indorsed on such instrument.

S. H. Russell, for the appellant.

M. Trice, assistant attorney general, for the state.

⁴⁸⁴ **DAVIDSON, J.** Appellant was convicted of passing a forged instrument, and prosecutes this appeal. This is a companion case to cause No. 1016, Mallory v. State (just decided), 36 S. W. Rep. 750. The record in this case is before us in quite a different shape from that in the former case. The witness Durham, while testifying for the state, over the objection of the appellant, was permitted to state that he obtained from E. A. Yost, J. R. Wilson, R. F. Eisenlohr, and M. Stamm a description of the man who had passed upon them certain checks on the night of November 30, 1895, being the checks admitted in evidence in this case, and that, after he got a description from the parties named, he arrested the defendant, and that it was upon the description given him by said parties that he afterward arrested defendant. The defendant was not present when the conversations occurred between said parties and the witness Durham. It was objected that this testimony was hearsay, and calculated also to injure the rights of the defendant before the jury, and served to strengthen the state's testimony as to the identity of the defendant, as the party who passed or uttered the forged checks upon said parties. We think these objections are well taken. These parties who gave a description to Durham were witnesses in the case, and testified. Their testimony as to the description and identity of the defendant was not attacked by showing that they had made contradictory statements in regard to this matter, and it was not permissible to corroborate them as to their description of the defendant, by the evidence of the witness Durham to the effect that they had given him a description of a party that led him to believe that defendant was the guilty party, and caused him to make the arrest. It is not necessary here to state how far an officer will be permitted to go in testifying in regard to his actions in making the arrest of a party suspected of crime, or to detail information he may

have received that led him to make an arrest, or to perform any given act looking toward the arrest of a party or ferreting out crime. Suffice it to say that the testimony here detailed by the witness Durham was unauthorized upon that ground, for it was tantamount to a statement that these witnesses were correct in their identity of the accused as the party who passed the checks. The evidence as given was clearly hearsay, and inadmissible. The state was permitted to introduce in evidence two checks passed upon Wisdom, Yost, and Stamm, with the indorsement of the name of "Michael Gorman" placed thereon. This was objected to, because immaterial, irrelevant, and calculated to prejudice the defendant's rights in the premises. We think this testimony was admissible: See, *Hennessey v. State*, 23 Tex. Crim. App. 340; *Burks v. State*, 24 Tex. Crim. App. 326; *Burks v. State*, 24 Tex. Crim. App. 332. The state was also permitted to prove by Yost, Eisenlohr, Stamm, and Wisdom that they saw the defendant indorse the name "Michael Gorman" on the various checks introduced in evidence. They testified that this was the first time they ⁴⁸⁵ had ever seen the defendant. The defendant relied upon an alibi. In this connection the defendant himself testified, and denied writing the name "Michael Gorman" on the check, denied being present or having any connection whatever with the passing of the instrument, and, after identifying a letter he had written to his sister some six or eight months prior to the alleged passing of these instruments, he proposed to introduce that letter in evidence before the jury for the purpose of comparing the handwriting of the party who wrote the name "Michael Gorman" on the checks. In other words, he proposed, as one of the means of disproving his presence at the time and place of the passing of the checks, to show by this letter that his genuine handwriting was not the same as that of the indorsement on the check. We are of opinion that the letter, under all of the circumstances, was sufficiently identified as the handwriting of the defendant to authorize its introduction as a means of comparison between the handwriting on the check and that contained in the letter. The court seems to have excluded this letter, because it was not authenticated by any other testimony than that of the defendant himself. This did not go to the relevancy of the testimony, but to its weight before the jury. While the court may have believed the defendant was testifying falsely in regard to writing the letter, yet the jury may have thought differently; and he was entitled to whatever weight might be attached to it in comparing the hand-

writing of the letter with the indorsement on the check. The envelope in connection with this letter, which was produced by the defendant, bore the postmark, "Waco, May 9, 1895." The letter was addressed to the defendant's sister in Memphis, Tennessee, and the postmark on the back of the envelope showed that it was received at Memphis on the night of the following day. Presumably for the purposes of this trial the defendant had procured said envelope and letter to be sent to him from Memphis. Now, if the defendant's sister, to whom the letter was addressed, had been present and had been placed upon the stand, which would have been permitted, she could have testified as to the receipt of the letter from her brother and identified the same. It then would have been before the jury for their inspection and comparison in connection with the alleged indorsement by the defendant on the draft he was charged with uttering. In our opinion, equally, the defendant would be permitted to show that he had written said letter to his sister before this accusation was brought against him, and that the same had been returned to him by mail, and identify the same before the jury for their comparison and inspection with the alleged indorsement on the check. The charge of the court given in this case on the subject of other checks which were introduced in evidence is objected to by appellant. Without criticising said charge, we would suggest that, upon said testimony, the learned judge frame a charge in accordance with the decisions of this court on the subject of such extraneous testimony: See *Burks v. State*, 24 Tex. Crim. App. 326; 24 Tex. Crim. App. 332; *Hennessy v. State*, 23 Tex. Crim. App. 340; *Thornley v. State*, 36 Tex. 480 Crim. Rep. 118; 61 Am. St. Rep. 837. For the admission of Durham's testimony, and for the rejection of the letter offered in evidence by the defendant, the judgment is reversed, and the cause remanded.

Hurt, presiding judge, absent.

EVIDENCE—HEARSAY.—Hearsay testimony is not admissible: *Lynch v. Postelthwaite*, 7 Mart. 69; 12 Am. Dec. 495; *Walker v. Forbes*, 25 Ala. 139; 60 Am. Dec. 498; *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551.

FORGERY—EVIDENCE OF FORMER FORGERIES.—Evidence that the prisoner has uttered and passed, or has in his possession, other forged notes, is admissible to prove the scienter: *State v. Williams*, 2 Rich. 418; 45 Am. Dec. 741, and note. See *McCartney v. State*, 8 Ind. 353; 56 Am. Dec. 510. For the purpose of identifying a party and transaction, and as *res gestae*, evidence of another forgery committed by him at the time of the commission of the offense for which he was on trial, is competent: *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474. See monographic note to *Strong v. State*, 44 Am. Rep. 299-308.

HOWARD v. STATE.

[37 TEXAS CRIMINAL REPORTS, 494.]

FORGERY—ALLEGATION OF PARTNERSHIP NAMES.—In an indictment for forgery of a partnership name, it is not necessary to set out the names of the individual members of the firm or partnership, as is required as to the owners of stolen property in prosecutions for theft. Neither is it essential to aver an intent to defraud all of the partners in the firm by name.

FORGERY — INDICTMENT — ALLEGATIONS.—An indictment for forgery need not set out the purport clause nor contain an allegation that the act was done with intent to defraud some particular person. It is sufficient merely if the instrument alleged to be forged be set out by its tenor, and that the indictment contain an allegation that the instrument was made by the defendant without lawful authority, and with intent to defraud. But if the indictment contains a purport clause, and the instrument is set out by its tenor, and there is a variance between the purport and tenor clauses, it is fatal to the indictment.

FORGERY—INDICTMENT—EVIDENCE.—If an indictment for forgery sets out the instrument alleged to be forged by its tenor alone, evidence is admissible to show that the name is fictitious, or that the signature to the instrument is that of a partnership.

APPELLATE PRACTICE — EVIDENCE NOT OBJECTED TO.—Questions asked and answers elicited from a witness, without objection or motion to strike out on the trial, cannot be considered on appeal.

FORGERY—EVIDENCE OF PREVIOUS CRIME.—On a trial for forgery, evidence is admissible to show that the accused has committed a similar offense, and it makes no difference where it was committed.

CRIMINAL LAW — EVIDENCE OF CHARACTER.—Evidence that the accused held a position of trust at a fair salary is not proof of reputation, and is not admissible when the question of reputation is not in issue.

CRIMINAL LAW — INSANITY FROM DRINK AS DEFENSE.—Temporary insanity produced by the recent use of ardent spirits on the part of an accused at the time he commits a crime is not ground for his acquittal, but may go in mitigation of his punishment.

N. G. Kittrell, for the appellant.

M. Trice, assistant attorney general, for the state.

⁴⁹⁵ **HENDERSON, J.** Appellant was convicted of forgery, and given two years in the penitentiary. The indictment is in the following form as to the charging part: That said P. Howard, "with intent ⁴⁹⁶ to injure and defraud, did willfully and fraudulently make a false instrument in writing, which said false instrument in writing is to the tenor following: 'Houston, Texas, Feby. 7, 189—. No. 201. Planters' & Mechanics' National Bank. Pay to P. Howard, or order (\$25.00), twenty-five dollars.

John Finnigan & Co.'—contrary to law and against the peace and dignity of the state." Appellant filed a motion in arrest of judgment, on the ground "that the indictment does not charge any offense, and specifically sets up that, while the instrument purports to be signed by John Finnigan & Co., there is no allegation who or what John Finnigan is or are. So far as revealed by the indictment, John Finnigan & Co. may be an individual, a firm, or a corporation. Because there is no allegation who composed or constituted the said firm of John Finnigan & Co., the evidence revealing that the same is a firm composed of two partners, but who such partners are is not alleged, as is necessary under the law. Because it is not alleged that said instrument purported to be the act of another, the mere signature of John Finnigan & Co. not disclosing who or what John Finnigan & Co. was or were." Appellant insists that this case comes squarely under the decision of *Labbaite v. State*, 6 Tex. Crim. App. 483. The indictment in that case had a purport clause, which is not so in the present case. The allegation in the indictment in said case is that it purports to be the act of White & Gibson, but it is stated in the decision that these are simply the surnames of two persons, and their given names are not stated, and it is not stated that they are partners; and the court proceeds to apply the same principle to the allegation of names of the alleged forged persons as is applicable to the owners of stolen property in theft. The case of *State v. Harrison*, 69 N. C. 143, is also referred to as authority upon this point. The charge in that case was for forging a duebill in the following words: "Due to Wm. H. Harrison for filling of rosin and storing of spirits, \$50.00, payable 25th of August. Williams & Murchison— with intent to defraud one George W. Williams and one Daniel M. Murchison, against the form of the statute in such case made and provided, and against the peace and dignity of the state." The court says in that case: "The indictment charges that the defendant forged the name of the firm of Williams & Murchison with intent to defraud George W. Williams and Daniel M. Murchison, and there was evidence tending to show that he did forge the name of the firm with intent to defraud the firm, but there was no evidence that George W. Williams and Daniel M. Murchison were the individual members of the firm, and therefore there was no evidence that the intent was to defraud George W. Williams and Daniel M. Murchison"; and the case was reversed on this ground. It will be

noticed that in the first case there was a purport clause, and in the last that there was an allegation of an intent to defraud two certain persons, giving their full names, and the case went off on the proof that there was no evidence that George W. Williams and Daniel M. Murchison were the individual members of said firm. With reference to the first case, ⁴⁹⁷ it may be stated that we are inclined to differ with the court rendering said opinion to the effect that the same particularity is required in alleging the name of the persons whose names are forged as is required in alleging the ownership of stolen property. On this point we quote from Mr. Bishop as follows: "If the intent is to defraud a firm, the allegation is not required to be in the form essential in laying ownership. There the indictment must set out all the names of joint owners; but here, when a forger means to defraud two or more persons, whether constituting a firm or not, his intent is also to defraud each of them. Therefore, the indictment may lay it as to all or as to one or more, less than all, at the pleader's pleasure": See 2 Bishop's Criminal Procedure, sec. 424. We quote from a note to Wharton's Precedents of Indictments and Pleas, fourth edition, volume 1, page 282, as follows: "All the partners in a firm need not be set out in averring the intent to defraud. Thus, where the first count charged the offense to be committed with intent to defraud D. L. and D. L., Jr., and the second count stated the offense to have been committed with intent to defraud the president and directors of said company, and the fourth count, et cetera, with intent to defraud D. L., the court, on motion in arrest of judgment, held that the omission of one of the partners in one count and two of them in another was not fatal; for the acquittal on such an indictment will always be a bar to another prosecution for the same forgery, though laid with intent to injure some other person." The ordinary form of an indictment at common law contained a purport clause, and the rule seems to have been that the indictment should allege an intent to defraud some particular person: See 1 Wharton's Precedents of Indictments and Pleas, 274, 282. But under our system it is not necessary to set out the purport clause, nor is it necessary that the allegation contain an averment that the act was done with intent to defraud some particular person. It is sufficient merely if the instrument be set out by its tenor, and that the indictment contain an allegation that the same was made by the defendant without lawful authority, and with intent to defraud: See *Westbrook v. State*, 23 Tex. Crim App. 401. However, it has been

held in a number of cases that where the indictment contains a purport clause, and the instrument is set out by its tenor, and there is a variance between the purport and tenor clauses, it will be fatal to the indictment. In the case of Labbaite, above cited, the real question in that case was as to whether, when the indictment proposed to set out by a purport clause the names of the parties whose names were forged, it should set out their full names, and, if a partnership, that the names of the copartners be stated as such. And the North Carolina case, as we have seen, was decided on the proposition that, the prosecution having alleged the full names of the parties intended to be defrauded, the evidence did not support the allegation. So we take it that neither of said cases is an authority in this case. Here we have no purport clause, nor have we an allegation that the act was done with intent to defraud any particular person. We have the instrument simply set out according to ⁴⁹⁸ its tenor, with the allegation that the appellant made the same without lawful authority, and with intent to defraud. In support of the allegation of the indictment it became necessary for the state to prove that the defendant signed the name of John Finnigan & Co. to said instrument without lawful authority, and with intent to defraud. John Finnigan & Co. might be the name of a fictitious person, and it might be a commercial establishment conducted under said name by John Finnigan alone, or by John Finnigan and one or more firm members. In *Johnson v. State*, 35 Tex. Crim. Rep. 271, this court held that where the name of the alleged forged party was that of a fictitious person, the indictment need not allege this, but that proof that the name was fictitious could be made under the allegation that said instrument was made without lawful authority. In that case, the name of the fictitious person was that of a firm, and, if such proof can be made where the name of the alleged forged party was fictitious, we see no reason why the same proof cannot be made under an allegation that the instrument was executed without lawful authority, where the firm is in existence. In our opinion, the *Johnson* case is based upon correct legal principle, and is supported by the authorities, and is decisive of the question here presented. Appellant assigns as error the action of the court with regard to the examination of one Robert Howard, a witness for the defendant. Said witness had testified that he was acquainted with the reputation of the defendant for honesty and fair dealing in Galveston county, prior to the transaction charged against him, and that it was good. On cross-

examination by the state, counsel asked witness, "Is it not a fact that the defendant has once before been convicted of forgery in Galveston county?" And said witness answered, before objection, "No, sir; not in Galveston county." The district attorney then asked said witness was he (defendant) "convicted somewhere else, then?" To which the defendant's counsel objected on the ground that it was not proper cross-examination; that the state should be confined to the defendant's general reputation as to integrity and honesty in Galveston county. The objection of the appellant was sustained, and the question was not answered. Appellant contends that injury was done him by the answer of the witness, already made, to wit: "No, sir; not in Galveston county"; and also because the question itself was not a legal one, and was calculated to prejudice the appellant before the jury. With reference to the first objection, it is sufficient to say that the question was propounded and the answer elicited and no objection made to the testimony, and no motion was made to strike out the same. Moreover, in asking the question if appellant had committed a similar offense in Galveston county, Texas, it seems that the same was admissible: See 3 Rice on Evidence, 603, 605, and authorities there collated. With reference to the second objection, it does not appear to us that the asking of the question, which was not permitted by the court to be answered, was calculated to prejudice the appellant. And in our opinion it was not competent for the appellant to prove that he held a position of trust at a fair salary in Galveston.

400 This was no evidence of reputation, and it was not pertinent to any issue in the case. Objection is also made to the charge of the court on temporary insanity produced by the recent use of ardent spirits. The court, in effect, told the jury that if appellant, at the time he committed the act (if he did commit it), was temporarily insane from the recent use of ardent spirits, it would not acquit him, but it would go in mitigation of the punishment. This charge was in accordance with the decision of this court in *Evers v. State*, 31 Tex. Crim. Rep. 318; 37 Am. St. Rep. 811. Counsel for appellant, however, insists that such cannot be the rule of law, and asked special instructions on the subject, covering the question of insanity in connection with fraudulent intent. We do not believe that the facts in this case required a charge on the doctrine of temporary insanity produced from the recent use of ardent spirits at all, and so it is not a proper case in which to review the former decision of this court. No witness in this case testified to the temporary insan-

ity of the appellant at the time he committed the alleged forgery. Robert Howard, a brother of the appellant, was not in Houston at the time of said forgery. He testifies that he heard of the defendant being in Houston on a spree, and when he got there he found him very drunk, and he took him to Galveston with him. Doucett stated "that when the defendant gets under the influence of liquor he gets very drunk, and that the defendant wanted him to cash the check in question"; and he says "that when the defendant came to him he was not so drunk that he did not know his own identity, and was not so drunk that he did not know that he was not John Finnigan & Co." F. M. Joseph, a cousin of the defendant, testified that he met him on the streets of Houston, somewhere about that time, and that he was in a fearful condition; that he was very stupid, caused either by liquor or morphine, or something of the kind; that he was talking foolishly, and he said that Finnigan & Co. owed him money, and he was going to stay in Houston until he got it. This witness stated that he did not know his condition at the time he signed the check. This is all the testimony regarding his temporary insanity offered by the defendant, and the circumstances of the passing of the check in this case do not indicate that he was in such a condition that he did not know right from wrong, or that he did not know that the act he was then doing was wrong. We do not believe the evidence called for or required the court to charge on the question of insanity in connection with intent, regardless of the cause by which the same may have been produced.

There being no errors, the judgment is affirmed.

FORGERY—SUFFICIENCY OF INDIOTMENT.—An indictment for forgery must set forth the instrument forged with literal accuracy, or show good cause for the omission to do so; and the instrument thus set forth must be shown in the proof with the same accuracy: *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, and note; *State v. Potts*, 8 N. J. L. 26; 17 Am. Dec. 449. But no technical words, such as "tenor," et cetera, need be used to express that it is so set out. For this purpose, the words "of the purport and effect following" are sufficient, at least where the indictment then does in fact set out a copy of the instrument: *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158, and note. In an indictment alleging an instrument to be "in the words and figures following," a strict recital is necessary: *Commonwealth v. Bailey*, 1 Mass. 62; 2 Am. Dec. 3; but immaterial variance between the description and proof is allowable: *State v. Gryder*, 44 La. Ann. 962; 32 Am. St. Rep. 358; *Hocker v. State*, 34 Tex. Cr. Rep. 359; 53 Am. St. Rep. 716.

APPEAL—OBJECTIONS FIRST MADE ON.—A question not raised at the trial will not be considered for the first time on appeal; Note to *Greene v. Greene*, 59 Am. St. Rep. 567; *Mills v. Hart*, 24 Colo. 505; 65 Am. St. Rep. 241, and note.

CRIMINAL LAW—DRUNKENNESS AS DEFENSE.—Voluntary drunkenness ordinarily constitutes no excuse for a crime committed under its influence, even though the intoxication is so extreme as to make the person unconscious of what he is doing or as to create a temporary insanity: *State v. Kraemer*, 49 La. Ann. 766; 62 Am. St. Rep. 664, and note; though it is admissible in evidence to mitigate or lessen the penalty: *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note; *Evers v. State*, 31 Tex. Cr. Rep. 318; 37 Am. St. Rep. 232, and note.

FORGERY—EVIDENCE OF OTHER OFFENSES.—On a trial for forgery, evidence is admissible to show that the accused has passed other forged instruments: *Mallory v. State*, 37 Tex. Cr. Rep. 482; ante, p. 808, and note.

EX PARTE TINSLEY.

[37 TEXAS CRIMINAL REPORTS, 517.]

CONTEMPT—HABEAS CORPUS AS A REMEDY.—If a court has jurisdiction over the subject matter, although its judgment may be erroneous, it is not void and cannot be reviewed on habeas corpus; but if the court is without jurisdiction of the subject matter or of the parties, or lacks power to make the order in the particular case, it cannot punish for contempt or disobedience of such order, and habeas corpus may be invoked to avoid such punishment.

JUDGMENTS—APPOINTING RECEIVER—VALIDITY.—A judgment appointing a receiver for a corporation is not void merely because some of the stockholders are related to the judge making the appointment.

CONTEMPT—ORDERING PROPERTY TURNED OVER TO RECEIVER—HABEAS CORPUS.—If a court has acquired jurisdiction over the property of an insolvent corporation and of a claimant thereto, or of a part thereof, its order on him to assign and turn over such property to a receiver for its preservation must be obeyed, however erroneous it may be; and the fact that the order may be too broad, and require the transfer of some of the property wrongfully, does not justify the claimant in refusing to obey. If the order is thus void in part, the remedy of the claimant is to apply to the court for a modification. If he fails to pursue this remedy, and disobeys the order, he may be committed for a contempt of court. Upon an appeal from the order committing him for contempt, or on habeas corpus proceedings for his release from such commitment, no error in the prior order requiring him to assign and turn over the property can be considered. The only question which can be presented is, whether the court had jurisdiction to make such prior order.

CONTEMPT—FAILURE TO TURN PROPERTY OVER TO RECEIVER.—If an officer of an insolvent corporation, through direction of some of its stockholders, has obtained the transfer of part of its property to himself as an individual, the court having jurisdiction of the property of the corporation has authority to order him to turn such property over to the receiver for administration under the orders of the court, and, upon his failure to turn over the property in obedience to such order, he may be committed to jail for contempt.

CONTEMPT—FAILURE TO OBEY ORDER—PUNISHMENT.—If a court, in punishing for a contempt for failure to obey a valid order of the court to turn over certain property, merely fines

the contemner and orders him into custody until he complies with such order, without imposing any imprisonment as part of the penalty, such punishment is not void as imposing an unlawful imprisonment. In such case, any imprisonment would be self-inflicted, as it might be avoided by paying the fine and obeying the order of the court.

Hudson & Seay and Fiset & Miller, for the relator.

Ewing & Ring and M. Trice, assistant attorney general, for the state.

⁵²⁶ HENDERSON, J. This is an original application to this court for a writ of habeas corpus. It appears that heretofore, in the district court of Harris county, Drew and others brought a suit against the Houston Cemetery Company, a corporation, and others, and, among other things, prayed for the appointment of a receiver. William Christian was appointed receiver, and in the judgment appointing him he was ordered, after giving bond and making affidavit, et cetera, to take possession of all the property of the Houston Cemetery Company, and, among other things, certain described notes, the minute-book of said corporation, alleged to be in the hands of Thomas Tinsley, and also four hundred and ninety-two dollars and fifty-two cents, a trust fund, alleged to be in the hands of said Thomas Tinsley. Thomas Tinsley was a defendant in said suit, and the order was directed to him to turn over said property to the receiver. Said receiver demanded the same, and, on the refusal of said Tinsley to make the delivery thereof, a writ of attachment was served on him, and he was brought before the court to show cause why he should not be committed for contempt of court in failing and refusing to deliver said property to the receiver. The applicant, Tinsley, filed his answer, and the matter was presented to the court, evidence heard on the issues presented, and the court made its order fining said Thomas Tinsley in the sum of one hundred dollars, committing him to the custody of the sheriff and to the jail of Harris county as for a contempt of court, on account of his failure to turn over ⁵²⁷ and deliver said property to the receiver; and the sheriff was instructed to hold him until said fine was paid, and, further, to retain him in custody until said property should be delivered to the receiver, or until the further order of the court. Said Thomas Tinsley made an application for a writ of habeas corpus to this court, which was granted, and the writ issued. On his being brought before the court, the respondent moved to dismiss the application and said writ, and remand the relator to the sheriff of Har-

ris county, for the reason "that said application fails to show, either by the recitals therein or the exhibits thereto attached, that the judgment from which the relief is sought is void; but, on the contrary, the judgment attached thereto shows upon its face an adjudication, and the relator had willfully placed himself in contempt of said court, and adjudicates the question as a fact here set up to avoid said judgment against relator. If the truth of all of the facts alleged be conceded, the same are not sufficient in law to nullify the judgment rendered. 2. Said application is insufficient for the further reason that it fails to show that the relator has complied, so far as was within his power, with the orders of the court on which the contempt is based." This brings before us the question whether or not the matters and things contained in the application show a void judgment, or one which is merely erroneous; the rule being that where a court has jurisdiction over the subject matter, although its judgment may be erroneous, it is not void, and in such case it cannot be reviewed on habeas corpus, but where the court is without jurisdiction of the subject matter or of the parties, or lacks power to make the order in the particular case, it cannot punish for contempt or disobedience of such order: See *St. Louis etc. R. R. Co. v. Wear*, 135 Mo. 230; *In re McCain*, 9 S. D. 57; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Kilgore*, 3 Tex. Crim. App. 247. On the motion to dismiss, the question is to be tried on the application for the writ, and we will set out such parts of the petition as are essential to a disposition of this case. As stated before, the relator sets out in his application for the writ the proceedings on which the court below committed him for contempt—that is, perhaps, not all of the proceedings, but the substantial features of the suit, and the main facts upon which the court based its action—which are as follows: On the 23d of April, 1896, Drew and others (some of the stockholders in the Houston Cemetery Company, a private corporation) brought suit in the district court of Harris county against said corporation, and Thomas Tinsley and others were made parties defendant therein. The corporation and the defendant answered in said suit. Among other things, the object of the suit was the appointment of a receiver to take charge of the property of the alleged insolvent corporation. On the hearing, William Christian was appointed receiver, and the court made its order requiring Thomas Tinsley to turn over and deliver to said receiver all of the property of said corporation in his possession. On the 21st of February, 1897, thereafter,

said receiver demanded of said Tinsley that he turn over to him a list of the notes described in Exhibit ⁵²⁸ A to the application, and a certain book, known as the "minute-book" of said corporation, and also four hundred and ninety-two dollars and fifty-two cents in cash, alleged to be a trust fund in the possession of said Tinsley, and belonging to said company. It is alleged that the applicant refused to turn over this property to the receiver, on the ground that he did not have and never had in his possession certain of said notes, which are set out in said petition, and that the remainder of said notes (as set out in Exhibit B to the petition) and the minute-book of said corporation, said applicant, Tinsley, claimed to hold and to have the right to hold in possession as collateral security for a certain note of fifteen hundred dollars for money loaned by him to said corporation prior to the appointment of the receiver. As to the four hundred and ninety-two dollars and fifty-two cents, applicant alleges that he never held said money in trust, but that one Wisby held the same, and had appropriated it, and that applicant had simply assumed to pay the same to the corporation, and that he did not hold the same in trust, but that it was a debt due by him to the company. He further alleges that he is solvent, and able to respond to any judgment that may be rendered against him in favor of the receiver on account of said property. Applicant alleges that said order requiring him to surrender certain property and pay over said money is without due course of law, and is null and void, and that an adjudication by the court that he was guilty of contempt in refusing and failing to do so, and fining him one hundred dollars, is null and void. He further contends that said judgment is null and void because John G. Tod, the judge who tried said cause, was at the date thereof related to C. H. Milby and wife, Maggie Milby, within the third degree, and that C. H. and Maggie Milby were stockholders in said corporation. He further says that said judgment and commitment were null and void, because the imprisonment is for an uncertain and indefinite period of time, and because he is not able to comply with said order. And he further alleges that the statute fixes the amount of punishment at a fine of one hundred dollars and imprisonment not exceeding three days, and that the judgment was excessive, and so null and void. He further charges that the matters set up and alleged do not and could not constitute a contempt, and that his confinement under said order of the court is null and void. In connection with the petition, the

judgment of the court, appointing a receiver and ordering said Thomas Tinsley to turn over the property in his possession to the receiver, William Christian, is attached thereto as an exhibit. Also, the following by exhibits: An application on the part of said receiver, showing to the court his demand upon Tinsley for said property, and his refusal to turn over and surrender the same to him, and praying that he appear at the courthouse, at a time fixed by the court, to show cause why he should not be punished for his misconduct in disobeying said order, as for a contempt of court. Also, the order of the court based thereon, requiring the defendant, Thomas Tinsley, to show cause before the district court of Harris county why he should not be punished for contempt of court in disobeying the decree of the court of April 3, 1896, et cetera. And also the judgment of the court on said application, as follows: "Monday, February 5²⁰ 8, 1897. (No. 18,969.) Octavius C. Drew et al. v. Houston Cemetery Company et al. In the Matter of William Christian, as Receiver Herein, Informant, against Thomas Tinsley, Respondent, for Contempt, et cetera. This sixth day of February, A. D. 1897, came on to be heard in open court the proceedings for contempt of this, the District Court of Harris County, Texas, against the respondent, Thomas Tinsley, upon the affidavit of said William Christian, as receiver, for a rule to show cause, et cetera, and the court's rule to show cause therein, both of February 2, 1897, and the answer of said respondent to such rule, and the replication of said informant to such answer, both this day filed herein; said respondent meantime having had due and reasonable notice in this behalf, and appeared in person and by attorney, and announced ready for the hearing. And the court having heard such affidavit, rule to show cause, answer and replication, and the evidence adduced, both oral and written, in support of the issues so tendered and joined, as well as the argument of counsel, doth find and declare: That the facts set forth in said affidavit and the special plea of said replication are true as concerns the minute-book, notes, and trust fund of four hundred ninety-two dollars and fifty-two cents, as herein specified, and that said respondent, under the evidence adduced, has failed to show cause as required, by the answer aforesaid, good or sufficient in law. Therefore it is considered by the court, ordered, and adjudged that the said respondent, Thomas Tinsley, is guilty of a contempt of this court, in having willfully disobeyed the court's order made and rendered in the above numbered and entitled cause on, to wit, the

23d day of April, A. D. 1896, appointing William Christian receiver of the property of every description of the Houston Cemetery Company, et cetera, by failing and refusing to turn over to said William Christian, as such receiver, after he had taken the oath and given bond, which was approved, and duly qualified as such receiver, as required by said order, notwithstanding due and personal demand made therefor upon him (Thomas Tinsley) by said William Christian, receiver as aforesaid, and though having it then and now within his power and ability to comply, the following described property of, and belonging to, said Houston Cemetery Company, covered by such order, to which it was entitled; the same being then and still held and controlled by him (Thomas Tinsley) as an officer of said Houston Cemetery Company, to wit: 1. The notes belonging to said Houston Cemetery Company, as its bills receivable then and thereto on hand, and covered by and embraced in said order of April 23, 1896, amounting to the sum of fourteen hundred and forty dollars and fifty cents, as shown by the schedule marked 'Exhibit A,' attached to the aforesaid affidavit, which schedule the clerk is directed to record on the minutes in connection herewith and to be taken as a part hereof. 2. That certain book belonging to said Houston Cemetery Company, and known as its 'minute-book,' then and there on hand, and covered by and embraced in said order of April 23, 1896. 3. The portion of the trust fund to which said Houston ⁵⁸⁰ Cemetery Company was entitled under its charter and by-laws, which accrued for and during the years A. D. 1894 and A. D. 1895, covered by and embraced in said order of April 23, 1896, amounting to the sum of four hundred and ninety-two dollars and fifty-two cents. And the court doth further consider and adjudge, order, and direct, that the said contemner, Thomas Tinsley, pay to the sheriff of Harris county, Texas, a fine of one hundred dollars, as a punishment for the contempt aforesaid, and that he forthwith turn over and deliver to said William Christian, as receiver aforesaid, the said notes, minute-book, and trust fund of four hundred ninety-two dollars and fifty-two cents, as an aid to the enforcement of the aforesaid order of April 23, 1896, and that in default of immediate payment of said fine, and of the delivery and turning over forthwith to said William Christian, as receiver aforesaid, of said notes, minute-book, and trust fund of four hundred ninety-two dollars and fifty-two cents, he, the said contemner, Thomas Tinsley, be imprisoned in the common jail of Harris county, Texas, until he shall pay the said fine of

one hundred dollars as herein directed, and until he shall turn over and deliver to the said William Christian as aforesaid—the said sheriff affording him (said Thomas Tinsley) a reasonable opportunity to do so, if he shall so desire—the said notes, minute-book, and trust fund of four hundred ninety-two dollars and fifty-two cents, and until he shall pay to the sheriff aforesaid his cost for executing the commitment hereunder, or until he shall be discharged by the further order of this court, and that, to carry this judgment into effect, the clerk of this court do forthwith, under his hand and the seal of this court, issue a commitment, in terms of the law reciting generally the proceedings herein, and to which there shall be attached, as Exhibit A thereof, a certified copy of the aforesaid order of April 23, 1896, under the seal of this court, and to which there shall also be attached, as Exhibit B thereof, the schedule of the aforesaid notes annexed to the aforesaid affidavit, or a copy of such schedule; and the clerk of this court shall also, in addition to the warrant of commitment, deliver to said sheriff a certified copy of this judgment, to be held by him as further evidence of his authority for the commitment hereby directed by the court. John G. Tod, Judge Eleventh Judicial District of Texas.” A schedule of the notes referred to in the above order accompanies this judgment. Following this order is a copy of the writ of commitment. All of these appear to us to be regular in form. As to the proposition of the relator that said judgment appointing a receiver is null and void because some of the stockholders were related to the judge making the appointment of the receiver, in view of the decision of the supreme court in said case, which was appealed, the same is not tenable: See *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536. The applicant refers us to a number of cases to support his contention that the court had no authority to make the order which it did, requiring the said Thomas Tinsley to turn over said property to the receiver—it being shown that he set up a claim thereto in his own right—⁵⁸¹ insisting that, if the court could enforce such order, it would be authorizing one person to take the property of another without due process of law, that if the receiver had any claim to the same, the courts of the country were open to him, and to recover the same he could bring his suit as any citizen, and that the action of the court in this regard was tantamount to imprisoning the applicant for debt. Among other cases, he cites us to the case of *Edrington v. Pridham*, 65 Tex. 612. But we do not understand that case to decide the question of the power of

the court to punish for contempt. This matter was not before the court. The question really decided was, that the proceeding, being originally in the nature of a contempt, and having been conducted as a contempt proceeding, a judgment for debt, with execution, could not be rendered against the defendant. The court say, in passing, that the "statute authorizes the district court to impose, for contempt, a fine not exceeding one hundred dollars; but if this limitation is unauthorized (Rapalje on Contempt, sec. 11), we cannot consider a judgment in favor of the receiver for two thousand five hundred dollars, to be collected by execution, as an exercise by the court of its inherent power to fine for contempt. Such a judgment does not vindicate the dignity of the court. It redresses private injury. The prosecution of the plaintiff in error for contempt did not warrant the civil judgment against him." In *Ex parte Hollis*, 59 Cal. 405, the court held that Hollis was not a party to the suit, and the order requiring him to turn over certain property which he claimed as his individual property was without authority of law and void. This is a well-considered case, and a number of cases in bankruptcy are cited, and all these are to the same effect—that a court has no authority to act by its orders on a third party, and compel him to turn over property to an officer appointed by the court. We quote from Hollis' case as follows: "The question therefore arises whether a superior court has authority to adjudge a party guilty of contempt, and to fine and imprison him, for not turning over to a receiver in insolvency moneys and effects, part of which he claims adversely to the insolvent debtor, and the other part is also claimed adversely by a corporation with which he is not connected as an executive officer or director. We think such a power cannot be exercised over a party unless he has collected and holds the money and effects as trustee for the estate of the insolvent debtor, and the court has jurisdiction over him as an officer of the court, or as a party to the proceedings: *Ex parte Perkins*, 18 Cal. 64; *Ex parte Smith*, 53 Cal. 204; *Ex parte Cohn*, 55 Cal. 196. It is not claimed that the real estate and building association was an officer of the court, or a party to the proceedings in insolvency, nor was the petitioner. Verifying the answer of the insolvent debtor did not make him a party. Process against the corporation brought the corporation alone into court. Being in court, it verified and filed its pleadings according to law. It was the only party to the record. Neither the president, secretary, the individual directors, nor stockholders were parties to the proceeding: *Apperson v. Mu-*

tual Ben. Life Ins. Co., 38 N. J. L. 272." To the same effect is ⁵³² the case of *State v. Ball*, 5 Wash. 387; 34 Am. St. Rep. 866. Beach on Receivers, sections 216, 247, to which applicant refers, is simply to the effect that the court, in ordering the property to be turned over to a receiver, will not try the title to the property, and is not authorized to make an order, unless the party in possession is before the court. Thompson on Receivers, sections 6921, 6928, to which we are cited, is to the effect that the receiver has no right to seize goods in the possession of a stranger to the action, and make himself the arbitrator of the title and the right to the possession of said goods, but it is his duty to bring the proper action to recover possession. Process of contempt cannot be resorted to to force their parties to deliver property of which he has never had possession to a receiver, though the receiver may have authority to obtain possession of the property from them by proper proceeding. To the same effect is High on Receivers, sections 165-170, inclusive. In the case before us the applicant was not a stranger to the proceeding. He avers that he was a party, and he claims, not the fee in the notes and minute-book, but simply that he had a lien on the same; and he insists that the court had no authority and no power to require him to surrender the same to the receiver, because, he says, having a lien, he was entitled to the possession. Now, there can be no question that the district judge had jurisdiction of the case, had authority to appoint a receiver, and had authority to order and require the officers of the corporation to turn over the property of the corporation in their hands to said receiver. The authorities go to the extent of holding that, even if the court should commit an error in the judgment as to the property, the parties before the court cannot refuse to surrender the property to the receiver. In *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717, it is held that the receiver or the party who wishes an actual delivery of the property should call upon the master to decide what property, legal or equitable, belonging to the defendant, and to which the receiver is entitled under the order of the court, is in possession of the defendant, or under his power or control. And it is the duty of the master to direct the defendant to deliver to the receiver the actual possession of all such property, or to allow him to take possession thereof. If the defendant is dissatisfied with such decision of the master, he must apply to the court to review the decision, or he will be compelled by process of contempt to comply with the master's directions. Where property is in the possession of a third person, who claims

the right to retain it, the receiver must either proceed by suit against him, or the complainant must make him a party to his suit, and apply to have the receiver to take the property in his hands, so that an order may be made for its delivery, which may be enforced by process of contempt. In *Tolman v. Jones*, 114 Ill. 148, it is held: Where a court of chancery has acquired jurisdiction over the property of an insolvent corporation, and of the defendant claiming the same, its order on the defendant to assign and turn over the property claimed by him to a receiver, for its preservation, must be obeyed, however erroneous it may be. And the fact that such order may be too broad, and ⁵³³ require the transfer of some of the property wrongfully, will not justify the defendant in refusing to obey. An error in the exercise of the jurisdiction of the court, in an order to one of the defendants to assign and deliver to the receiver some property not belonging to the corporation, will not render the order void as to such property, and justify the defendant in refusing to obey the same. In such case, the test of jurisdiction as to the subject matter will be the allegation of the bill, and not the proof under it. But even if the order of the court is void in part, in requiring certain property not derived from the corporation to be delivered, the remedy of the defendant is to apply to the court for a modification of the order. If he fails to pursue this remedy, and fails to obey the order, he may be committed for a contempt of court. Where a party's refusal to make a delivery of property to a receiver in pursuance to an order of court is reported to the court, and he is present when the matter is considered, and makes no objection to the proceedings, and is fully heard by himself and counsel in the matter, and, after being ordered by the court to execute the delivery, refuses to do so, the court will be justified in making an order for his commitment for contempt, without any rule on him to show cause to the contrary. On an appeal from an order of the court committing a defendant to the county jail for refusing to obey a prior order requiring him to assign and hand over certain property to a receiver, no error in such prior order can be considered. The only question as to such prior order that can be considered is whether the court had jurisdiction to make it. It matters not, so far as the question of condemnation is concerned, whether such order was made on sufficient proof or not. The relator in that case claimed that some of the property did not belong to the corporation, and was not embraced in the order, and the court had no right to make an order requiring the same to be turned over.

But it was held that the court had jurisdiction of the subject matter and of the parties, and it had the power to make such order, and to commit the party for contempt for refusing to obey the same. In *In re Rosenberg*, 90 Wis. 581, which was a contempt proceeding—a bill of discovery in which the party refused to answer—it was held that in a habeas corpus proceeding only jurisdictional questions will be inquired into. The court say: “The power to determine is jurisdictional. The correctness or justness of the determination of the question is not open for consideration on a habeas corpus proceeding.” It further holds “that the writ of habeas corpus will not be issued where, upon the hearing of the application therefor, it appears that the court must, in the end, remand the prisoner.” It will be observed, as before stated, that the relator did not claim the legal title in the notes or in the minute-book, but merely an equity or a lien thereon to secure his debt. It seems that he, as an officer of the company, had transferred to himself, as an individual, through the direction of some of the stockholders, the notes and minute-book in question. The action of the court in ordering him to turn over said property to the receiver was by ⁵³⁴ no means an adjudication as to his lien. This, if it was a genuine lien, would be preserved to him in the hands of the receiver. The effect of the order was merely to place these articles, together with all the property of the corporation, in the hands of the receiver for administration under the orders of the court. In our opinion, the court unquestionably had the power to do this, and did not exceed its jurisdiction in making said order. As to the fund: If it be not a trust fund in possession of relator, but a mere debt, it may be that it would not be competent for the court to have made the order requiring this fund to be turned over to the receiver. However, that question was submitted to the court. The record shows that proof was heard upon this question, and the court below decided that this was a trust fund in the hands of the relator. If it be conceded, however, that it was a debt due by the relator to the corporation, still the relator was in contempt of court as to the remainder of the property—that is, the balance of the notes and the minute-book—and the order was unquestionably valid as to these. And, the relator not having responded to the order of the court as to these matters, we do not feel inclined to grant him any relief. It would be his duty to show before this court, in order to obtain relief by the writ of habeas corpus, that he had done all within his power to comply with that portion of the order of the court which it unques-

tionably had a right to make. Applicant also contends that the court exceeded its power in assessing the punishment it did against him, claiming that the punishment imposed would cause his imprisonment beyond the three days authorized by statute. It will be noted that the court, in exercising its punitive authority, only fined the relator one hundred dollars. It imposed no imprisonment as a penalty. On the relator responding to the order of the court, he would have been immediately enlarged, and need not go to jail for a moment. We are cited to the case of *Ex parte Kearby*, 35 Tex. Crim. Rep. 531, 634, but in that case we were speaking of the power of the court to punish, and stated that that power was circumscribed and limited by the statute. We were not then discussing the question of the authority of the court to enforce its orders and decrees. If, under this statute, it was given to a party to refuse to obey the orders of a court by merely submitting to a fine of one hundred dollars and three days' imprisonment, and then go free, still contumacious of the order of the court, the court would be rendered powerless to enforce its orders. It either follows that the court would be authorized, after having imposed a fine of one hundred dollars and three days' imprisonment, on the payment of said fine and serving three days in jail, to bring the recalcitrant party before the court, and then demand if he was willing to comply with its orders, and, on refusal so to do, to repeat, and continue to repeat, the fine and costs, by distinct orders; or, on the other hand, without imposing any imprisonment, on the refusal of the party to comply with the orders of the court, to remand him to the custody of the officer until he did comply. There might be some question in treating a continued contempt as a new contempt. There certainly can be no punishment at ⁵³⁵ all in ordering a party to do that which is within the power of the court to order, and which is within his ability to perform; and in such case, if the party is punished at all, it would appear to be self-inflicted. So far as the statute with reference to punishments for contempt is concerned, that is a mode of enforcing the rights of the court and of preserving its respect and dignity. It is a punishment. The other is not a punishment, but a specific mode of enforcing a particular duty. Conceding that the court has the power and authority to require the duty, the going to jail by the party is a self-imposed punishment, and not the imposition of a punishment by the court. The order in such a case is not punitive, but remedial: See *Phillips v. Welch*, 11 Nev. 187. We hold that the court, in imposing the fine it did, did not exceed its pe-

cuniary punishment, and that its order to the relator to turn over the property as commanded in the judgment was not the assessment of any imprisonment as a punishment. It was a command of the court, which the court had a right to make in the exercise of its duty; and although the court, in the alternative, ordered the relator into the custody of the sheriff until said order was complied with, yet the court gave the relator full opportunity of compliance. If he preferred to go to jail rather than comply, and that alternative was adopted by him, it necessarily appertains to the inherent power of the court to carry on the administration of justice to thus compel obedience to its orders. In our opinion, the court *a quo* did not exceed its power or authority in making the order it did in this case; and the application for the writ of habeas corpus showing that the party is legally restrained and has no right to the writ, the motion to dismiss the same is sustained, and the relator is remanded to the custody of the sheriff of Harris county.

Habeas corpus refused and application dismissed.

CONTEMPT—PUNISHMENT FOR—HABEAS CORPUS AS RELIEF.—One imprisoned for violating an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by the writ of habeas corpus: *Ex parte Arnold*, 128 Mo. 256; 49 Am. St. Rep. 557, and note. One adjudged guilty of contempt and imprisoned is not entitled to release upon habeas corpus unless the proceedings under which he is imprisoned are void, in whole or in part: *Ex parte Keeler*, 45 S. C. 537; 55 Am. St. Rep. 785, and note.

CONTEMPT—PUNISHMENT—RELIEF ON APPEAL.—A judgment convicting and punishing one for a contempt of court may be reviewed and set aside only for want of jurisdiction of the court over the subject matter or over the defendant, or for want of power to render the particular judgment or order complained of. The finding of the court upon a question of fact will not be reviewed: *State v. Knight*, 3 S. Dak. 509; 44 Am. St. Rep. 809, and note. The only question upon such an appeal is as to the jurisdiction of the lower court to render the judgment assailed: See monographic note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 36; and monographic note to *Mullin v. People*, 22 Am. St. Rep. 417-426. Disobedience of an order made without jurisdiction is not contempt: *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529, and note.

CONTEMPT—PUNISHMENT.—Commitment of a witness for contempt is not objectionable because it makes imprisonment conditional upon his submission and obedience: *Burnham v. Morrissey*, 14 Gray, 226; 74 Am. Dec. 676.

JUDGES—DISQUALIFICATION TO ACT—VALIDITY OF JUDGMENT.—Under a statute prohibiting a judge from sitting in a cause where he is related, by consanguinity or affinity, to either of the parties, a judge is not disqualified from sitting in a proceeding to which a corporation is a party, by his kinship to a stockholder in the corporation: *Matter of Dodge etc. Mfg. Co.*, 77 N. Y. 101; 33 Am. Rep. 579. As to the validity of judgments by disqualified judges, see monographic note to *Moses v. Julian*, 84 Am. Dec. 126-133.

EX PARTE ELLIS.

[37 TEXAS CRIMINAL REPORTS, 589.]

JUDGMENTS RENDERED DURING VACATION of courts are void, unless expressly authorized by statute.

CONTEMPT—JUDGMENT DURING VACATION.—An order or judgment of a court, made during vacation, adjudging a person guilty of contempt for default in the payment of alimony previously ordered to be paid is void, and may be attacked on habeas corpus.

CONTEMPT.—PROCEEDINGS DURING VACATION of a court adjudging a person guilty of contempt in disobeying the previous order or judgment of the court are not judicial, but the personal acts of the judge at a time when he has no power to act, and for that reason void.

M. Trice, assistant attorney general, for the state.

Rice & Bartlett, for the relator.

W. E. Rogers, for the respondent.

540 **HENDERSON, J.** This is an original application for writ of habeas corpus. The writ was granted, and the case was submitted on an agreed statement of facts. It is shown by the record that W. S. Ellis filed suit in the district court of Falls county against his wife, Sarah Ellis, for divorce. Said suit was tried on the 25th of August, 1896, at the July term, and a divorce was granted on the cross-bill of the defendant. The judgment of said court made a partition of the community property, consisting of a couple of mules, a cow and a calf, and some hogs; and the custody of a baby boy, the offspring of the marriage, was awarded the defendant, Sarah Ellis, until said child, then about twelve months old, should arrive at the age of eight years, when it was authorized to choose for itself; and in the order or judgment plaintiff was allowed the privilege of visiting it. The judgment further recites as follows: "And it further appearing to the court that the defendant (Sarah Ellis) is poor and without means, and that the plaintiff is in good circumstances, it is ordered, adjudged, and decreed that plaintiff shall pay over to the defendant, for the benefit of their child, the said John Ellis, the sum of five dollars per month, to be paid semi-annually from the date of their separation; the first payment to be paid December 1, 1896, the same being the first six months, when thirty dollars shall be paid; the said money to be expended by the defendant for the benefit of said child exclusively, as to her seems meet and proper. And it is further ordered by the court that the plaintiff herein pay all costs of this suit." On the 6th of March, 1897, the fol-

lowing order was entered: "Ex ⁵⁴¹ parte W. S. Ellis. On this, the sixth day of March, 1897, in vacation, came on to be heard the application of Sarah Ellis, asking the court to enforce the payment of alimony awarded her at a former term of the district court of Falls county for the support and maintenance of their child. Thereupon came both parties in person and by attorney, and announced ready, and the court, after hearing the reading of the complaint and the defendant's answer thereto, and the evidence and argument of counsel, it appearing to the court from the evidence on both sides that there has been paid to the complainant the sum of fourteen and ten one-hundredths dollars, leaving a balance due and yet unpaid as alimony the sum of fifteen and ninety one-hundredths dollars: It is therefore ordered, adjudged, and decreed by the court that the said W. S. Ellis pay to the said Sarah Ellis, complainant herein, within ten days from date hereof, the sum of fifteen and ninety one-hundredths dollars, the same being the balance due and unpaid of the amount due and unpaid on the first day of December, 1896; and it is therefore ordered and decreed by the court that, should the said W. S. Ellis fail or refuse to pay the amount adjudged against him, due and unpaid, according to the order herein rendered, the clerk will issue a writ of commitment herein, directed to the sheriff or any constable of Falls county, commanding him to take the said W. S. Ellis and commit him to jail until said sum of fifteen and ninety one-hundredths dollars and costs are fully paid. It is further ordered by the court that execution issue in favor of officers of court for costs in this behalf expended." In pursuance of this order, a writ of attachment was issued on the twenty-sixth day of March, 1897, as follows: The State of Texas, County of Falls. The State of Texas, to the Sheriff of Falls County, Greeting: You are hereby commanded to take into custody and commit to the jail of your county instanter W. S. Ellis, who was, on the sixth day of March, 1897, in vacation, before the district court of Falls county, adjudged guilty of the offense of contempt of court by refusing to obey an order of the district court commanding him to pay, within ten days from date of said order, the sum of fifteen and ninety one-hundredths dollars and one dollar costs, and him safely keep until the amount of fifteen and ninety one-hundredths dollars are fully paid, or otherwise discharged by law. Herein fail not, but of this writ make due return, showing how you have executed the same. Witness my hand and seal of office at Marlin, this twenty-sixth day of March, 1897. W. A. Powell, Clerk District Court, Falls County." In

pursuance of these orders of the court, it appears that the appellant was arrested, and placed in jail, in default of payment of said sum of fifteen dollars and ninety cents, and sued out this writ of habeas corpus. He claims that said judgment is void, because the court had no authority to enter a judgment against him for permanent alimony, after the trial and disposition of said case; and because the order of the court adjudging him guilty of contempt was made in vacation, and was such an order as the court did not have authority to make out of term time; and he further urges that said order is void, and of no effect, because it fails to adjudicate the ability of the applicant to pay the sum of money ⁵⁴² which the court in the judgment required him to pay. It has been repeatedly held, and is supported by the current authorities, that this court will not grant a writ of habeas corpus, and review a merely erroneous judgment. It will only do so when the judgment is absolutely void; that is, one in which the court rendering the judgment did not have jurisdiction of the subject matter, or did not have jurisdiction of the parties, or did not have the power to render the particular judgment it did. As to the contention of the applicant to the effect that the court did not have jurisdiction over the subject matter of granting alimony of a permanent character, we would observe that our statute on the subject would appear to cut off the power of the court to grant alimony to the wife to continue after the rendition of the judgment in the divorce suit. See Rev. Stats., 1895, art. 2986. Also, *Pape v. Pape*, 13 Tex. Civ. App. 99. If it be contended that, although the judgment calls the allowance alimony, it was not in fact alimony, but an allowance for the support of the child of the applicant, then we are inclined to the opinion that it is only such a judgment as could be enforced by civil remedies, as by execution, and not by the summary process of contempt. The father might be liable for necessities furnished the child; but this, in our judgment, could only be enforced by civil process. The order or judgment for contempt rendered in this case, if we refer to the statutes authorizing the holding of court in Falls county (of which we take judicial cognizance), was at a time when a term of court could not be held in said county; and, moreover, the order or judgment shows on its face that it was made and rendered in vacation. There can be no question that this was a judicial act on the part of the court. It adjudged that the applicant was in default in not complying with the former judgment of the court, and that his default was a contempt, and ordered him to be committed

to jail on account of his failure to pay said sum of money. It is generally held that judgments of courts made in vacation, unless authorized by some express law, are void: See Black on Judgments, sec. 179, citing a number of authorities; *Ex parte Ireland*, 38 Tex. 344; *Aiken v. Carroll*, 37 Tex. 73; *Grant v. Chambers*, 34 Tex. 574; *Ewing v. Perry*, 35 Tex. 777; *Hunton v. Nichols*, 55 Tex. 217; *Blair v. Reading*, 99 Ill. 609; *Devine v. People*, 100 Ill. 290; *State v. McKinnon*, 8 Or. 487. In the last-named case, the exact question here was before the Oregon court, and it was there held that the judge of the circuit court in vacation has no power to hear and determine charges of contempt for disobeying judgments or orders of the court. 'The exclusive jurisdiction over such charges belongs to the court whose judgment or orders have been disobeyed and can only be exercised during term time. We quote from that case as follows: "The transcript discloses the facts that the judgment, in respect of which the disobedience is charged as a contempt, was a judgment rendered by the circuit court for Douglas county, at its May term, 1879, while the proceeding for contempt was taken wholly before the judge of the court in vacation after. ⁵⁴³ said term. If this was an error, it goes to the jurisdiction, and, as it appears from the record itself, this court is bound to take judicial notice of it, although not assigned, or not even appearing in the argument. If this want of jurisdiction appeared to the judge before whom the proceeding was had at any stage, he should, of his own motion, have dismissed the cause; and this court, on appeal, stands in the same position": Citing *Hollingsworth v. State*, 8 Ind. 258; *Heyer v. Burger*, 1 Hoff. Ch. 17; *Evans v. Christian*, 4 Or. 376; *McKay v. Freeman*, 6 Or. 453. Other questions are discussed in the brief of counsel, but the above we deem sufficient to dispose of this case, as it goes to the jurisdiction and power of the court. It is not necessary to hold in this case that the district court of Falls county had no power, under any circumstances, to make the order it did, allowing alimony or a support for the maintenance of the child of the applicant; but, as stated above, we are inclined to that view. However, we do hold that the proceedings in vacation adjudicating applicant guilty of contempt was not the judgment of any court, but the personal command of a judge made at a time when he had no power or authority to make or render it, and that it was void.

It is therefore considered, ordered, and adjudged that the relator be discharged, and that a copy of this order be sent to the

district court of Falls county for observance. It is further ordered that the applicant herein pay all costs of this proceeding.

Hurt, presiding judge, absent.

JUDGMENT—RENDITION IN VACATION.—Generally, judgments rendered in vacation are without jurisdiction and void: Note to *Adler v. Van Kirk Land etc. Co.*, 62 Am. St. Rep. 141; *Davis v. Fish*, 1 G. Greene, 406; 48 Am. Dec. 387. But such a judgment is valid if entry was in accordance with the agreement of the parties entered in open court: *King v. Green*, 2 Stew. 133; 19 Am. Dec. 46; or if authorized by statute and in compliance with court rules: *Adler v. Van Kirk Land etc. Co.*, 114 Ala. 551; 62 Am. St. Rep. 133. In some states a judge out of court has power to punish certain contempts: See monographic note to *Clark v. People*, 12 Am. Dec. 183.

EX PARTE PARK.

[87 TEXAS CRIMINAL REPORTS, 590.]

WITNESSES—ACCUSED AS WITNESS—DISMISSAL OF PROSECUTION.—The prosecution may be dismissed as to one or more defendants jointly indicted with others, with a guaranty on the part of the court against any other or further prosecution for the same offense in that case; and he or they may be then required to testify in that particular case except as to such matters as may tend to incriminate the witness in other cases of a similar nature still pending against him.

WITNESSES—DISMISSAL OF PROSECUTION—INCRIMINATION.—If the prosecution against an accused jointly indicted with others has been dismissed in a particular case, while other cases of a similar character remain pending, and he is placed upon the stand as a witness in the case in which the prosecution as to him has been dismissed, he may decline to answer a question asked, on the ground that it incriminates him, when there is reasonable ground to apprehend that, his answer would expose him to a criminal prosecution, or when the answers elicited on legitimate cross-examination can be used against him as a confession of guilt or participation in the cases still pending against him.

WITNESSES—INCRIMINATING.—A witness cannot be compelled to answer any question, if the answer tends to expose him to a criminal charge, but, if he states a particular fact, he is bound, on his cross-examination, to state all of the circumstances relating to that fact, although in doing so he may expose himself to a criminal charge.

WITNESSES—INCRIMINATING.—OBJECTION that an answer to a question asked would tend to incriminate the witness must be made at the threshold of the examination. He cannot wait and answer a part and then refuse to answer other questions legitimate to a cross-examination.

WITNESSES—INCRIMINATION—PRACTICE—HABEAS CORPUS.—After a witness has objected to answering a question on the ground that such answer might tend to incriminate him, it is the duty of the court to rule upon his objection, and, if it rules against him, the correctness of the ruling is to be tested, not only by the question, but by all the surrounding facts, and if it appears

therefrom that the court's decision is wrong, its action can be revised upon habeas corpus, when the witness is held in contempt for refusing to answer the question.

Miller & Williams, for the relator.

M. Trice, assistant attorney general, for the state.

⁵⁰³ HENDERSON, J. This is an original proceeding on a writ of habeas corpus, granted by this court. The record shows that C. F. Champion, W. P. Johnson, and C. B. Park (this relator) were jointly indicted on a charge of keeping for sale, offering for sale, and selling, tickets and part tickets in a lottery to one Dr. J. B. Smoot, and were on trial in the county court of Dallas county. After the parties had gone to trial, the case was dismissed as to C. B. Park, relator; and he was placed on the stand by the state as a witness. The county attorney propounded to said witness the following question: "Do you know of your own knowledge whether or not any lottery tickets were kept for sale, offered for sale, or sold, at the 'Lucky Corner' on or about the tenth day of February of this year?" The witness declined to answer said question, on the ground that a truthful answer to the same would tend to incriminate him of an offense against the laws of this state. Thereupon the court held that he was bound to answer said question, and on his refusal to do so, the judge remanded him to the custody of the sheriff of Dallas county until such time as he should answer said question. The applicant sued out a writ of habeas corpus, which was granted by this court. It was further shown before said court, and as a part of the record in this case, that said relator, C. B. Park, had been convicted within the past ten days in said court in about a half-dozen cases for keeping for sale, offering for sale, and selling, lottery tickets at the Lucky Corner, ⁵⁰⁴ and that there are now pending about twenty-five other cases against him for having and keeping for sale, offering for sale, and selling, lottery tickets at said Lucky Corner, in Dallas county, and that said last-mentioned cases now stand for trial in said court. It was further made a part of the record that said Park had acted as the agent of his codefendants at said Lucky Corner. The question is thus presented as to whether or not, on this state of case, the county judge was authorized—that is, had the power—to treat the refusal of the witness to answer said question as a contempt of court, and to punish him therefor by confinement in the county jail until such time as he should agree to testify and answer said question. Our constitution (see Bill of Rights, sec. 10), among

other things, provides "that a defendant shall not be compelled to give evidence against himself." The statutes provide that prosecutions may be dismissed against defendants, the county or district attorney filing written reasons therefor, which shall be embodied in the judgment: See Code Crim. Proc., 1895, arts. 37, 630. Article 709 further provides: "The attorney representing the state may at any time, under the rules provided in article 37, dismiss a prosecution as to one or more defendants jointly indicted with others, and the person so discharged may be introduced as a witness by either party." This would seem to imply the power on the part of the state to dismiss a case against a defendant, and require his testimony. Of course, such dismissal must be with the guaranty to the witness on the part of the court against any other or further prosecution for the same offense; and this statute has been so construed: See *Camron v. State*, 32 Tex. Crim. Rep. 180; 40 Am. St. Rep. 763; *Neeley v. State*, 27 Tex. Crim. App. 327; *Fleming v. State*, 28 Tex. Crim. App. 234. It has, however, been held that this authority or power extends only to the particular case then on trial, but not to any other distinct offense: See *Heinzman v. State*, 34 Tex. Crim. Rep. 76; *Moseley v. State*, 35 Tex. Crim. Rep. 211. Conceding that the dismissal against the relator of the case then on trial, and requiring him to testify, was a guaranty on the part of the court that he should be no further prosecuted for said offense, the issue is then presented: Was the question of such a character, under the conditions then surrounding the defendant, as to other offenses of like character then pending against him, as would tend to criminate him as to said offenses? We hold that this matter is, in the first instance, to be determined by the court or judge; that is, "it must appear to the court from the character of the question and the other facts adduced in the case that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime. The liability must appear reasonable to the court, or the witness will be compelled to answer": See *Ex parte Irvine*, 74 Fed. Rep. 954, which is an exhaustive discussion of this question, and the authorities there cited; *Fries v. Brugler*, 12 N. J. L. 79; 21 Am. Dec. 52, and note thereto p. 57; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122, and authorities cited in note thereto. We quote ⁵⁹⁵ from Wharton's Criminal Evidence, section 466, as follows: "To protect the witness from answering, it must appear from the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend that, should

he answer, he would be exposed to a criminal prosecution. The witness, as will be seen, is not the exclusive judge as to whether he is entitled on this ground to refuse to answer. The question is for the discretion of the judge, and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. But, in any view, the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency." Mr. Wharton further says (Wharton's Criminal Evidence, sec. 469): "The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer. Thus, a witness may be compelled to answer as to the conditions which he shares with many others, though not as to conditions which would bring the crime in inculpatory nearness to himself. But, in order to claim the protection of the court, the witness is not required to disclose all the facts, as this would defeat the object for which he claims protection. It is not, indeed, enough for the witness to say that the answer will criminate him. It must appear to the court, from all the circumstances, that there is a real danger, though this the judge, as we have seen, is allowed to gather from the whole case, as well as from his general conception of the relations of the witness. Upon the facts thus developed, it is the province of the court to determine whether a direct answer to a question may eriminate." And see authorities cited in notes to said sections. This rule has been followed in this state: See *Floyd v. State*, 7 Tex. 215. After the court has determined from the environments and the nature of the case, so far as stated, that the answer of the witness might tend to criminate him, it is then the province of the witness to state whether or not a truthful answer to the question asked would tend to criminate him: See authorities, *supra*. It is contended by the assistant attorney general that the answer to the question asked, to wit: "Do you know of your own knowledge whether or not any lottery tickets were kept for sale, offered for sale, or sold, at the 'Lucky Corner,' on or about the 10th of February of this year?" would require only a simple answer of "Yes" or "No," and that this could not possibly tend to criminate the witness in any offense for selling lottery tickets at said Lucky Corner. In answer to this, it may be stated that the record discloses that the relator was a clerk of his codefendants at said Lucky Corner, evidently for the sale

of lottery tickets; and, in the other cases pending, the fact of knowledge on his part that lottery tickets were sold at said Lucky Corner might constitute an important element or essential link in the chain of circumstances to convict him of said other offenses. Concede, however, that it would not have this tendency, yet the witness having been placed on the stand by the state, and this testimony having ⁵⁰⁶ been elicited from him by the prosecution, it would not be possible for the state to interfere and prevent a cross-examination of the witnesses upon this testimony, even though the prosecution had not pressed the investigation further with said witness. Assuming that the witness would state, in answer to said question, that he knew of the sale of lottery tickets at said place (and it must be assumed, else the state would not have offered it, that the fact that this witness knew of such sales was material for the state), then an obvious inquiry on the part of the defense on cross-examination would be as to the means of knowledge on the part of the witness that lottery tickets were sold at said corner; that is, how he knew the fact. If he knew it from his presence there at the time, this would place him in close contact with the offense of selling lottery tickets, and if the cross-examination was pressed still further, and he answered that he knew of such sales because he made them, then it would bring him in direct contact with the offense, and could be proved, in a trial for such other offense, by the confession of the witness. Under the authorities, as we understand them, the objection of privilege—that is, that the answer to the question would tend to criminate him—must be made at the threshold. He cannot wait and answer a part, and then refuse to answer other questions legitimate to a cross-examination. If he voluntarily states a part of the testimony, he waives his right, and cannot afterward stand on his privilege. If it were otherwise, he might give in testimony hurtful to a defendant, but refuse to be cross-examined as to matters which might be to defendant's benefit: See *Rapalje on Witnesses*, sec. 269; *Wharton's Criminal Evidence*, sec. 470; *State v. Blake*, 25 Me. 350; *Commonwealth v. Price*, 10 Gray, 472; 71 Am. Dec. 668; *People v. Freshour*, 55 Cal. 375; *Connors v. People*, 50 N. Y. 240; *State v. K.*, 4 N. H. 562. The latter case of *State v. K.*, 4 N. H. 562, is so much to the point that we quote the opinion in full. K. was indicted for unlawfully breaking and entering a public burial place, and taking up and carrying away the body of a person who had been there interred. On the trial, the defendant called a witness, who stated that he knew defendant

to be innocent, but that he could not state how he knew that without implicating himself, and he inquired of the court whether or not he was bound to testify at all, and, if bound to testify, how far he was compelled to go. The court used the following language: "The witness is not to be compelled to answer any question if the answer will tend to expose him to a criminal charge; but, if he state a particular fact in favor of the respondent, he will be bound on his cross-examination to state all of the circumstances relating to that fact, although in doing so he may expose himself to a criminal charge. We shall not compel the witness to state that he knows the respondent to be innocent if a full account of his knowledge on that subject will tend to furnish evidence against himself. But, if he testifies to that fact, we shall permit the attorney general to inquire how the witness knows that fact, and compel him to answer the question. It is clearly inadmissible to permit a witness to give a partial account of his knowledge of the transactions, suppressing ⁵⁹⁷ other of the circumstances, whether the evidence is to be used in favor of or against the state." We believe the facts as stated in the record disclose a case where the answer of the witness—that is, taking it for granted that he should answer "Yes," that he knew of such sales might tend to criminate him in other cases then pending against him. Certainly, a cross-examination would involve the means of knowledge on the part of the witness as to the sale of lottery tickets at said Lucky Corner; and this means of knowledge, if it was personal on the part of the relator, it occurs to us, would or might constitute important testimony against him in the trial of said other causes. We are impressed with the delicate position in which a trial judge is placed in a matter of this sort, having a desire, on the one hand, to protect the rights and privileges of the individual witness, and, on the other, having a due regard for the right of the community to have the wheels of justice unclogged as far as may be consistent with the liberty of the individual. Sometimes it may be difficult to discern the dividing line, but in all such cases we believe the doubt should be solved in favor of the liberty of the citizen. However, in this case it does not occur to us that there is any question of doubt as to the privilege exercised by the witness. We have stated above that the court decided, in the first instance, whether the answer would criminate the witness. We have also stated that the witness could not decide this question. If the witness were permitted to decide the question, the ends of justice would frequently be defeated. If the

decision of the court be conclusive, then the witness might be deprived of a constitutional right. We are therefore of opinion that the rule is, that it is the duty of the witness to object if he desires to protect himself. It is the duty of the court, then, to rule upon his objections, and, if the court should rule that the answer would not criminate him, the correctness of the ruling of the court is to be tested, not only by the question, but by all of the surrounding facts; and if it should appear that the surrounding facts, taken in connection with the question asked, show that the court's decision was wrong, upon habeas corpus the action of the court can be revised. And, in support of these propositions, we refer to the case of *Holman v. Mayor*, 34 Tex. 668, and authorities there cited.

It is accordingly ordered that the relator be discharged, and that he pay the costs of this court, and that a copy of this judgment be certified to the county court of Dallas county for observance.

WITNESSES—PRIVILEGE TO REFUSE TO ANSWER.—No one can be required to criminate himself: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863. The constitutional provision that "no person shall be compelled, in a criminal case, to be a witness against himself," confers immunity from testifying only where his evidence would tend to subject him to prosecution and punishment for a criminal offense. Under all other circumstances he cannot avoid an answer on the ground that it may tend to criminate him: *Ex parte Cohen*, 104 Cal. 524; 43 Am. St. Rep. 127, and note; *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851. His right to refuse to answer is a personal privilege: *Fries v. Brugler*, 11 N. J. L. 79; 21 Am. Dec. 52; and if he waives the privilege, and on direct examination voluntarily opens an account of a transaction, he will be compelled on cross-examination to complete the narrative; he will not be allowed to state a fact and afterward refuse to give the details: See monographic note to *Fries v. Brugler*, 21 Am. Dec. 61, discussing this matter.

HABEAS CORPUS—REVIEWING COMMITMENT FOR CONTEMPT.—The rule in contempt proceedings is, that the functions of the writ of habeas corpus, when the party who has appealed to its aid is in custody under process, do not extend beyond inquiry into the jurisdiction of the court by which the commitment for contempt was issued, and the validity of the process on its face: See monographic note to *Mullin v. People*, 22 Am. St. Rep. 422. A witness committed for contempt for refusing to criminate himself by answering a question is entitled to his discharge on habeas corpus: *In re Nickell*, 47 Kan. 734; 27 Am. St. Rep. 315.

McGLASSON v. STATE.

[87 TEXAS CRIMINAL REPORTS, 620.]

FORGERY—EVIDENCE OF OTHER CRIMES.—On a trial for forgery, evidence of other contemporaneous crimes of the same character committed by the accused is admissible, as tending to establish identity in developing the *res gestae*, or in making out the guilt of the accused by circumstances connected with the transaction, or to explain the intent with which the accused acted with respect to the matter charged against him; and when it is proposed to show systematic crime, subsequent as well as prior offenses tending to establish identity or intent are admissible in evidence, although they are not part of the same offense.

FORGERY—EVIDENCE OF OTHER CRIMES.—On a trial for forgery, evidence of distinct offenses of the same character committed by the accused is admissible, though not contemporaneous, nor a part of the same transaction, if it shows or tends to show that the accused had adopted the same plan to utter forged instruments in other cases as is charged by the prosecution in the case on trial.

EVIDENCE—COMPARISON OF HANDWRITING.—The rule authorizing the evidence of signatures of witnesses for comparison only goes to the extent of admitting such signatures as are proved or conceded to be genuine, and such as were executed before there was any motive to fabricate or disguise the handwriting. Hence it is not permissible to allow a prosecuting witness, in a case of forgery where his signature is alleged to be forged, and he denies such signature, to make his signature before the jury for the purpose of its being used as evidence bearing on the issue whether the signature to the alleged forged instrument is his genuine signature or not. This is true although such witness can write nothing but his name, unless it is also shown that he can only write that in one form and without any change in the letters.

J. E. Yantis, for the appellant.

M. Trice, assistant attorney general, for the state.

622 **HENDERSON, J.** Appellant was convicted of passing as true a certain forged instrument, in writing, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal. The state's case was for passing as true an alleged forged vendor's lien note executed by one Knowles in 1893. It appears that said note was a part of a transaction involved in the sale of a tract of forty acres of land. The land was in the name of one Russell. It appears, however, that he held said tract of land in trust for appellant, McGlasson, and that the notes were made payable by Knowles to Russell, and subsequently transferred to appellant. There were three notes, each for the sum of two hundred and sixty-six dollars and seventy cents, executed on the seventeenth day of November, 1893, and payable in one, two, and three years thereafter. The

forgery was alleged to be of the name of J. M. Knowles, the signer of said notes, and the vendee of said tract of land, and the passing was to one Roseborough. The state's evidence further tended to show that besides said genuine ⁶²³ notes, which were executed by J. M. Knowles, appellant forged and uttered other notes similar in terms to said genuine notes; the charge being for uttering one of the said last-mentioned forged notes. The evidence further showed that the genuine notes, except one, about which there was no testimony, were negotiated in 1894 to Silliman & Co., at Fort Worth, and the alleged forged notes were pledged as security to D. D. Roseborough in 1894, and the one appellant is charged to have uttered was bought by said Roseborough in 1895. The defense set up by appellant was to the effect that in executing said notes by Knowles there was a mistake, and in fact but two notes were executed, and that he subsequently called on Knowles, in 1894, and represented the mistake to him, and he agreed to, and did execute three notes in lieu of the alleged original notes; and he also stated to said Knowles at the time that said original notes were lost or mislaid, and he indemnified said Knowles against said original notes. Said original notes were shown to have been negotiated to Silliman & Co., at Fort Worth, in 1894, by the defendant. Defendant, however, explains that he had no knowledge of said negotiation, and claimed not to have negotiated them. On the trial the state introduced a number of transactions similar to that involved in the prosecution in this case; that is, some of them genuine sales of land, with genuine notes, and then the forging of notes similar to said genuine notes, and the negotiation of the same. These are the notes known as the Holcomb, Stringer, and Wallace notes, negotiated to E. Rotan; and the Clark notes, also negotiated to Rotan, executed November 5, 1895, and negotiated in February, 1896; and the Curtis notes, executed on the 24th of July, 1893, and negotiated to Mrs. Sewell in 1894. The state introduced testimony showing that these notes were all based on land transactions, and that duplicates of the genuine original notes were forged, and both the originals and the forged duplicates were negotiated by the appellant, and that most of these transactions involved several notes—said notes being made payable in consecutive years. With the exception of the Curtis notes, which were executed in 1893, shortly before the execution of the notes in this case, the remainder of said notes were executed and negotiated subsequently, extending from 1894 to 1895. Appellant objected to the introduction of

this testimony—that is, testimony regarding other transactions—on the ground that they were distinct offenses, not connected with the offense charged, and no part of the same, and not admissible. We have examined this question in the light of the authorities. It has been repeatedly held by this court that evidence of contemporaneous crimes was admissible when such evidence tended to establish identity in developing the *res gestae*, or in making out the guilt of the accused by circumstances connected with the transaction, or to explain the intent with which the accused acted with respect to the matter charged against him: See *House v. State*, 16 Tex. Crim. App. 25; *Kelley v. State*, 18 Tex. Crim. App. 262; *Holmes v. State*, 20 Tex. Crim. App. 509; *Alexander v. State*, 21 Tex. Crim. App. 407; 57 Am. Rep. 617; *Oliver v. State*, 33 Tex. Crim. Rep. 624 541; Wharton's Criminal Evidence, secs. 31-48, et seq. And, when the object of such collateral matter is to show system, subsequent as well as prior offenses, tending to establish identity or intent, can be put in evidence: See *Hennessy v. State*, 23 Tex. Crim. App. 340; Wharton's Criminal Evidence, secs. 37, 38. But it is insisted that, to be part of a system, it must be connected with and part of the same offense. This however, is not correct. In *Mason v. State*, 31 Tex. Crim. Rep. 306, which was a case of forgery, other distinct forgeries were admitted in evidence: See *Heard v. State*, 9 Tex. Crim. App. 1. To the same effect, see, also, *Commonwealth v. Price*, 10 Gray, 472; 71 Am. Dec. 668, and *Rex v. Smith*, 4 Car. & P. 411. And the same principle is applicable to other offenses. In *Regina v. Bleasdale*, 2 Car. & K. 765, which was a case of theft of coal, it appearing that the coal was stolen from a shaft, and there were a number of takings, the court say, "But, in order to show that when the prisoner took the coal of Mr. Gunning in number 10 drift, he was out of his boundary, I permit it to be proved that he has gone out of his boundary in many other instances, and into the property of other persons, taking in all fifteen thousand yards of coal." In that case other distinct takings were allowed to be proved in order to show that the prisoner's defense, to wit, that he did not know he was out of his own boundary, was but a mere pretext. *Brown v. State*, 26 Ohio St. 176, was a case where a certain horse doctor had at different times and places injured other horses for the purpose of obtaining fees for curing the same. He was indicted for injuring one horse, and proof of the injuries to the others was held admissible: See, also, *Kramer v. Commonwealth*, 87 Pa. St. 299, and *Thayer v. Thayer*, 101 Mass. 111; 100 Am. Dec.

110. The forgery and the utterance thereof admitted in evidence were not part of the same transaction as the forgery charged, and were not contemporaneous in point of time. One of the instances preceded that charged in the indictment, and the others followed, covering a space of more than a year; but they were similar in the method adopted of forging and of uttering to that charged against the defendant and shown by the evidence. Appellant, however, denied the forgery, and introduced evidence tending to show that the paper was not in fact a forgery, but was executed by the prosecutor, Knowles, himself. It is true his testimony shows him guilty of the same degree of moral turpitude, according to his own defense, as if he had forged the paper, and uttered it knowing it to be forged; but the defense set up by him as to passing a forged instrument, if true, would defeat the prosecution in this case. In order to strengthen the state's case, we believe that the testimony was competent, not because it was contemporaneous, not because it was a part of the same transaction, but because it showed or tended to show that appellant had adopted the same plan to utter forged instruments in other cases as was insisted upon by the state he had pursued in this case. Stephens on Evidence, page 19, lays down the rule thus: "Facts necessary to be known to explain or introduce a fact in issue, or relevant, or deemed to be relevant, to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity ⁶²⁵ of any thing or person whose identity is in issue, or is deemed to be relevant to the issue, or which fixes the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes, respectively": And see authorities cited thereto. Under this rule, and the authorities above quoted, the testimony objected to was properly received by the court. During the trial of the case it was an issue whether or not the name, "J. M. Knowles," signed to the alleged instrument appellant was charged with uttering, was the true and genuine signature of the said J. M. Knowles. "The said J. M. Knowles was introduced as a witness on this issue by the state, and he was permitted, over the objections of the defendant, after he denied his execution of the note which defendant is charged to have uttered in this case,

after said note had been shown to him, and after the signature to said note had been shown to him, to then and there write his name on a piece of paper; and this piece of paper, with the name as thus written, was permitted to be introduced in evidence, and was shown to the jury by state's counsel, for the purpose of comparison, of handwriting. To all of which the defendant then and there objected, on the ground that it was contrary to the rules of evidence to permit said witness to thus write his name after he had been shown the signature to the note which is charged to have been forged, and for the reason that it afforded said witness an opportunity to disguise his handwriting, and to write his name different from the way he wrote it to the said note, if he had done so; and for said reasons defendant objected to said signature as then and there written during the trial, to go to the jury as evidence. But the court overruled all of said objections, and permitted said witness to so write his name, and permitted said name, as thus written, to go to the jury as evidence." In this state it is competent to prove handwriting by comparison, and the comparison need not be of other signatures of the party, introduced in the case for other purposes. The rule is different in many of the other states, but it seems to be controlled in this state by statute. See article 794 of the Code of Criminal Procedure, which is as follows: "It is competent in every case to give evidence of handwriting by comparison made by experts or by the jury, but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath": See *Phillips v. State*, 6 Tex. Crim. App. 364; *Walker v. State*, 14 Tex. Crim. App. 609; *Heacock v. State*, 13 Tex. Crim. App. 97; *Rogers v. State*, 11 Tex. Crim. App. 608; *Heard v. State*, 9 Tex. Crim. App. 1. The question presented in the above bill of exceptions is whether it is permissible to allow a witness—a private prosecutor, in a case of forgery, where his signature is alleged to be forged, and he denies such signature, to make his signature ⁶²⁶ before the jury for the purpose of being used as evidence in the case bearing on the issue as to whether or not the signature to the instrument alleged to be forged is his genuine signature. We believe it is the general rule, supported by all the authorities, and gainsaid by no well-considered case which we have been able to find, that such testimony is not admissible; the principle upon which the exclusion of this character of evidence is founded being its liability to fabrication, the witness, at the time he makes said signature for the purpose of comparison, having a motive to fabricate,

and having the means furnished him at the time to aid him in such fabrication. The question and the test to be applied in all such cases is, Was the witness' knowledge acquired under such circumstances as would show that the party had a motive for disguising his handwriting? If so, the testimony should be excluded, else a party would be permitted to manufacture testimony for himself: See Lawson on Expert Evidence, 307-314; 1 Thompson on Trials, sec. 1135, and authorities there cited; King v. Donahue, 110 Mass. 155; 14 Am. Rep. 589; Bronner v. Loomis, 14 Hun. 341; Commonwealth v. Allen, 128 Mass. 46; 35 Am. Rep. 356; Reid v. State, 20 Ga. 684. The cases that appear to antagonize this rule either did not have the question in them, or the matter was not discussed upon principle: See Smith v. King, 62 Conn. 515; Williams v. Riches, 77 Wis. 569. In this case the witness was shown his purported signature to the forged instrument, and was then asked to write his name, that the jury might compare the same, in order to determine whether the alleged forged signature was his signature or not. Of course, it was to the interest of the prosecuting witness to write his signature differently from the copy before him, and it is not the intention of the law to thus present temptations to human infirmity. It is insisted, however, that the witness could only write his own name, and that consequently he was incapable of changing the form of his signature. If the evidence established the fact that he could not write his name except in one form—that is, without a change in the formation of any letter—the position would be sound; but we have no such evidence in this case. The inducement to fabricate is too great, under such conditions, and in such cases the courts do not authorize such testimony. This court, in authorizing evidence of such signatures of witnesses for comparison, only goes to the extent of admitting such signatures as are proved or conceded to be genuine, and that were executed before there was any motive to fabricate. We accordingly hold that the admission of this testimony was improper. It was upon a material issue, and was calculated to prove hurtful to the appellant. We deem it unnecessary to discuss other assignments of error presented.

For the error of the court in admitting the signature of the appellant made before the jury during the trial of the case for the purpose of comparison by them, the judgment of the lower court is reversed and the cause remanded.

FORGERY—EVIDENCE OF OTHER CRIMES.—On a trial for forgery, evidence is admissible to show that the accused has committed a similar offense, and it makes no difference where it was

committed: *Howard v. State*, 37 Tex. Cr. Rep. 494; ante, p. 812. For the purpose of identifying the accused and the transaction, and as *res gestae*, evidence of another forgery committed by him at the time of the commission of the offense for which he is on trial is admissible: Note to *Mallory v. State*, ante, p. 808.

FORGERY—COMPARISON OF SIGNATURES.—Comparison for the purpose of determining the genuineness of the signature to the instrument alleged to have been forged can only be made with such writings as are legally in evidence for some other purpose than that of being compared: *People v. Parker*, 67 Mich. 222; 11 Am. St. Rep. 578, and note.

EX PARTE LAKE.

[37 TEXAS CRIMINAL REPORTS, 656.]

CONTEMPT—EXTRADITION—HABEAS CORPUS.—An extradition agent is not guilty of contempt of court in departing hastily and clandestinely from the state with his prisoner, after receiving him under a warrant issued by the governor pending an application by the prisoner for a writ of habeas corpus to secure his release from custody under another charge, although such agent, by his attorney, has protested against the issuance of the writ of habeas corpus.

CONTEMPT—JURISDICTION.—Power conferred upon a court to commit to prison one who refuses to obey a writ of habeas corpus, to remain there until he is willing to obey such writ and pay all costs of the proceedings, is exclusive, and an officer who removes a prisoner pending an application for such writ cannot be punished until the writ has issued and the officer has disobeyed it.

CONTEMPT—JURISDICTION.—Unless the court has jurisdiction of the supposed contemner, or some order, decree, or process, within the jurisdiction of the court to make, has been resisted or disobeyed, the court has no power to punish for contempt. Jurisdiction over the party does not confer power to punish for contempt unless some such order, decree, or process has been disobeyed, or the party is guilty of some act of the nature of malpractice in the case, or has disobeyed reasonable rules of court. This rule does not apply to contempts arising from newspaper articles pertaining to pending cases.

CONTEMPT.—TO CONSTITUTE CONSTRUCTIVE CONTEMPT of court, there must have existed, at the time, some order or writ within the jurisdiction of the court to make, which the alleged contemner has disobeyed or violated.

CONTEMPT—JURISDICTION—HABEAS CORPUS.—Proceedings adjudging a party guilty of contempt of a court having no jurisdiction of the subject matter or of the person are null and void, and the alleged contemner is entitled to his release on habeas corpus.

Taylor & Williams and G. Clark, for the relator.

W. S. Baker, J. E. Boynton, and M. Trice, assistant attorney general, for the respondent.

660 HURT, P. J. The governor of Oklahoma Territory issued to the governor of this state a requisition, in proper form, for J. E. Edwards, who was charged by indictment with the of-

fense of assault with intent to murder in that territory. Lake was named as the extradition agent, for the purpose of carrying Edwards to the territory. Edwards applied to Judge Surratt, judge of the district court of the nineteenth district, for a writ of habeas corpus, which was granted, ⁶⁶¹ and, upon a hearing before said judge, was discharged, because of some supposed or real informality in the warrant. (We are not called upon to pass on the action of Judge Surratt in discharging Edwards.) Thereupon Lake made complaint before a justice of the peace, as provided for by articles 1024 and 1025 of the Code of Criminal Procedure, 1879, whereupon the justice issued a warrant for the arrest of Edwards as required by article 1026. The warrant was executed by the sheriff of McLennan county. (The complaint and warrant were in proper form.) Pending this condition of affairs, Lake applied to the governor of Texas for a corrected warrant to be issued and forwarded to the sheriff of McLennan county. The governor issued the warrant, and directed the same to the sheriff of McLennan county, as requested by Lake. But, before the warrant issued by the governor was received by the sheriff of McLennan county, Edwards again applied to Judge Surratt for a writ of habeas corpus. Counsel for Lake and counsel for Edwards argued the propriety of issuing the writ. While Judge Surratt was considering the matter, the executive warrant reached the sheriff of McLennan county, by virtue of which Edwards was arrested and delivered to Lake, the authorized agent. Lake at once left with Edwards for Oklahoma Territory. Judge Surratt, being informed of this, telegraphed a warrant for the arrest of Lake, and he was arrested and brought back to Waco, McLennan county, and punished for contempt. The judgment is as follows: "Ex parte M. F. Lake. In contempt. February 16, 1897. On this day came on to be heard the answer and showing made by M. F. Lake as to why the judgment nisi entered against him in this court on the twelfth day of February, 1897, for contempt of this court, and imposing upon him a fine of one hundred dollars and confinement in the county jail of McLennan county for three days, should not be made final; and after hearing said answer, and the evidence offered in connection therewith, the court is of the opinion that said M. F. Lake has not purged himself, but is in contempt of this court, in this: That pending a hearing by the judge of this court of an application for a writ of habeas corpus, which had been presented to the said judge of said court by Frank Edwards, and which was then being heard, and of which proceedings the said Lake had full

notice and knowledge, and to which he had made himself party by voluntarily appearing before the said judge in person and by attorneys in said proceedings, and protesting against the issuance of said writ, and while said application, and said Lake's protest thereto, was being argued and submitted by said Lake's attorneys to the said judge of this court, said Lake procured the custody of said Edwards, and forcibly carried him out of the city of Waco and this county, for the purpose and with the intent of avoiding the process of this court, and in contempt and disrespect of this court and its proceedings, and for the purpose of interfering with and hindering this court in the administration of justice; but this court being of the opinion that said Lake did not, at the time he committed said acts, fully realize the enormity of the contempt being committed by him, remits the imprisonment assessed ^{\$62} in said nisi judgment, and reduces the fine therein to the sum of fifty dollars. It is therefore ordered, adjudged, and decreed by the court that the state of Texas do have and recover of and from the said M. F. Lake the said sum of fifty dollars, together with all costs of this proceeding, and that he be remanded to the custody of the sheriff of McLennan county until such fine and costs are paid." The assistant attorney general moves to dismiss this writ "because the application and exhibits thereto fail to show that the judgment from which relief is sought is void; that Judge Surratt had jurisdiction to render the same," et cetera. If Judge Surratt had jurisdiction to render the judgment, then this writ should be dismissed. Was the relator, Lake, guilty of contempt? If so, then this writ should be dismissed. There was no suit before Judge Surratt to which Lake was a party, if the application can be termed a suit. The application did not allege that Edwards was restrained of his liberty by Lake, but by J. W. Baker, the sheriff of McLennan county. Judge Surratt had no jurisdiction over Lake, because he was not a party in any manner whatever. Judge Surratt had no jurisdiction over Lake, because the writ had not been issued, and might never have been issued—in fact, it has never been issued. Lake could not be a party to the application, because he did not have charge of Edwards. Baker, the sheriff, who had Edwards under arrest, was not a party to this proceeding, because the writ had not been issued; and, if it had been issued, unless served upon him, or unless he had been informed of its issuance, he could not have been guilty of contempt, though he might have taken or spirited Edwards from the state to defeat the writ, if it should have been issued. Now, it is certain that Lake disobeyed

no order made by Judge Surratt, in any respect whatever. It is also evident from this record that Judge Surratt had not obtained jurisdiction over the person of Edwards, nor had he issued any writ or warrant for the purpose of obtaining jurisdiction over the person of Edwards. We therefore have a case in which a person is punished for contempt where the jurisdiction of the judge has not attached either to the subject matter or the person of the supposed contemner. But it is contended that as Lake, by his counsel, appeared before Judge Surratt, and opposed the issuance of the writ of habeas corpus, he was guilty of a contempt in spiriting Edwards from the state without informing the judge of his purpose. It is also contended that his conduct was in bad faith toward the judge; that he was trifling with the judge. Neither Lake nor his counsel had a legal right to appear before Judge Surratt and oppose the issuance of the writ, but the judge heard both counsel for Edwards in favor of, and counsel for Lake against, the issuance of the writ of habeas corpus. Was there anything wrong in this? Certainly not. Did such conduct bind Lake to await the action of the judge upon the application for the writ? If so, how? Pending this application the sheriff of McLennan county received a warrant from the governor of this state commanding him to arrest Edwards and deliver him to Lake, the legally appointed ~~603~~ extradition agent. This was done, and Lake left immediately for Oklahoma with Edwards. Let it be conceded that Lake had departed with great haste and clandestinely, and that his object was to defeat the writ if one should be issued. Would there have been any wrong in this? Would such conduct have been contempt of the authority of Judge Surratt? Under the circumstances it evidently would not have been: 1. Because Judge Surratt had obtained no jurisdiction over the person of Edwards; 2. Because he had obtained no jurisdiction over the person of Lake; 3. Because Lake had violated or disobeyed no order issued by Judge Surratt, for there was none of any character made in the case; and there was no order, decree, writ, or any other process in existence, forbidding him from doing just what he did, nor was there any order made by the judge for any such writ to issue; 4. Lake did what it was his duty to do, what he was commanded to do. He was acting under the command of the governor of this state, who had a perfect right to issue the warrant; and there was no order, no decree, made by any court of this state, prohibiting him from obeying the writ of the governor. In *Ex parte Buskirk*, 72 Fed. Rep. 14, the plaintiff filed a complaint against Buskirk and others,

praying for an injunction to restrain the defendant from cutting and hauling, or in any manner trafficking in, the timber upon the land claimed by the plaintiff. This complaint was served upon the defendant. Now, with the knowledge of this complaint, and the prayer for the injunction, Buskirk cut down and felled a large number of trees upon the land in controversy, for which he was punished for contempt. He refused to pay the fine, and was ordered to jail until he should pay the fine. He applied to the circuit court of appeals for a writ of habeas corpus, and obtained it. Upon a hearing thereof, he was discharged, because no order for the injunction had ever been made by the court. This case is more analogous to the one in hand than any we have found. We have found no case authorizing punishment by contempt for such conduct as is attributed to Lake, and we believe none can be found. The authorities have been closely and exhaustively examined, and the rule deducible therefrom is, that unless the court has jurisdiction of the supposed contemner, or some order, decree, or process, has been resisted or disobeyed, the court has no jurisdiction to punish for contempt. Jurisdiction over the party will not confer power to punish for contempt unless some order, decree, or process has been disobeyed, or the party is guilty of some act of the nature of malpractice in the case, or has disobeyed reasonable rules of the court. But, if there is no jurisdiction of the party, some order, et cetera, must be disobeyed—such order or decree or process as the court had jurisdiction to make. We are not treating of cases of contempt which might arise from newspaper articles pertaining to pending cases, et cetera. In addition to what has already been said, we would refer to some of our statutes which regulate writs of habeas corpus. We extract as follows from articles 167 and 168 of the Code of Criminal Procedure, 1895: When it is made to appear to a judge authorized to grant ⁶⁶⁴ a writ of habeas corpus that anyone is held in illegal confinement or custody, and there is good reason to believe that he will be carried out of the state, et cetera, or whenever the writ of habeas corpus has been issued and disregarded, said judge may issue a warrant to any peace officer, or to any person specially named by said judge, directing him to take and bring such person before him to be dealt with according to law. And, where it appears by proof that a person charged with having illegal custody of a prisoner is guilty of an offense against the law, the judge may, in the warrant, order that he be arrested and brought before him, and upon examination he may be committed, discharged, or held to bail as the law and the na-

ture of the case may require. Now, this proceeding apprehends the granting of a writ of habeas corpus, and the bringing of both the party alleged to be restrained and his restrainer before the court to be dealt with, and authorizes the court, upon examination of the person guilty of the false imprisonment, to hold him to bail, or discharge him, as the law and the nature of the case may require. This is one of the remedies afforded by our statute, and indicates how, in the contingency therein stated, the court may deal with a person who has another in illegal custody and proposes to spirit him out of the state. But it will be observed that this exercise of authority is made to depend upon the issuance of the writ of habeas corpus, and the bringing of the parties before the court. Articles 182 and 184 of the Code of Criminal Procedure, 1895, substantially provide that, when a party has been brought before the court on a writ of habeas corpus, the safekeeping of the prisoner pending his examination and hearing is entirely under the direction and authority of the judge or the court issuing the writ. In the last-named article it is provided that: "When service has been made upon a person charged with the illegal custody of another, if he refuses to obey the writ and make the return required by law, or if he refuses to receive the writ, or conceals himself, the court or judge issuing the writ shall issue a warrant directed to any officer or other suitable person willing to execute the same, commanding him to arrest the person charged with the illegal custody or detention of another, and bring him before such court or judge; and when such person shall have been arrested and brought before the court or judge, if he still refuses to return the writ, or does not produce the person in his custody, he shall be committed to prison and remain there until he is willing to obey the writ of habeas corpus, and until he pays all the costs of the proceeding." In this case it is not pretended that any writ of habeas corpus was ever issued by the judge for the prisoner, Edwards; nor is it pretended that Edwards was in the custody of the relator, Lake. Evidently he was in the custody of Baker, the sheriff of McLennan county. Suppose the judge, under the facts shown by the record in this case, had fined Baker; would he have had jurisdiction to impose upon him this punishment anterior to the granting on his part of any writ of habeas corpus? We think not. His power as to Baker would have been marked out and limited by the above statute. He would have been compelled, under the law, to have issued his writ to Baker, and then, if Baker had refused to obey said writ and make the return required by law,

or if he had refused to receive the writ, or had concealed himself to prevent its being served upon him, the court or judge issuing the writ would have had authority to issue a warrant for the arrest of Baker and have him brought before him; and if, after he had been brought before the judge, he had then refused to have obeyed the writ or to have produced Edwards, the court would only have been authorized to commit him to prison, and to confine him there until he produced the body of said Edwards. We hold that the rule "*expressio unius*" applies as to this statute, and that this statute gave the judge his sole power in the premises. If, under this statute, he had no power to imprison even Baker, by what process of reasoning was he authorized to imprison Lake, a third party? He did not have jurisdiction to imprison Baker; much less had he authority to fine and imprison the relator. Such action on the part of the judge would have been arbitrary as to Baker, and would be much more so as to the relator. No order or process had been issued in this case which would have given the court jurisdiction of Baker, and the court could make no subsequent order punishing him for contempt unless he was at the time guilty of some contempt. That is, as we understand it, contempts are divided into two classes: contempts in the presence of the court (that is, in *facie curiae*), or constructive contempts (that is, contempts committed outside of the court; acts violative of some decree or order of the court). It is not pretended that the relator, in this instance, was guilty of a contempt in the face of the court. Then the jurisdiction of the court can only be invoked to punish him for a constructive contempt. To be guilty of a constructive contempt, there must have existed, at the time, some order or some writ which he violated. In *In re Chiles*, 22 Wall. 157, which was an attempt to punish Chiles for disobedience of an order of court at the time having no existence, the court uses the following language: "The petition for the present rule on Chiles asks that he may be ordered, by a proper instrument in writing, to convey and transfer to the state of Texas all rights, titles, and interest which he appears or pretends to have in said bonds; and counsel, in oral argument, says he should be imprisoned for contempt until he complies with this order. But the obvious answer to this is, that no such order or decree has been made, and the defendant can be guilty of no contempt in not doing this until he has been ordered to do it and he is aware of it. To make an order now, and then punish for contempt or disregard of

it before it was made, is *ex post facto* legislation and judicial enforcement at the same moment." And see, also, *Cosby v. Superior Court*, 110 Cal. 45. From no point of view in which this question can be considered can the authority of the court to punish the relator for contempt be maintained. In the view we have taken, it is unnecessary to discuss the power of the executive to grant a pardon, or the imposition of costs by the judge who tried this case as a part of the punishment for contempt, and we pretermitt any observation in regard ~~ere~~ thereto. For the reasons stated, we hold that the attempt of the district judge to punish the relator for contempt was null and void, because he never acquired jurisdiction of either the subject matter or the person of the relator.

The relator is therefore ordered discharged.

CONTEMPT—WHAT IS NOT.—Disobedience of an order made without jurisdiction is not contempt in legal contemplation, though the court or judge making such order styles disobedience of it contempt: *Ex parte Grace*, 12 Iowa, 28; 79 Am. Dec. 529, and note. If the court is without jurisdiction of the subject matter or of the parties, or lacks power to make the order in the particular case, it cannot punish for contempt or disobedience of such order: *Ex parte Tinsley*, 37 Tex. Cr. Rep. 517; ante, p. 818, and note.

CONTEMPT—CONSTRUCTIVE—WHAT IS.—Contempts are of two kinds, direct and constructive; a direct contempt is one offered in the presence of the court while sitting judicially; a constructive contempt is one which tends to obstruct or embarrass a court, though the act be not done in its presence: *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; *Neel v. State*, 9 Ark. 259; 50 Am. Dec. 209, and note.

CONTEMPT—JUDGMENT FOR—REVIEW BY HABEAS CORPUS.—One imprisoned for violating an order or judgment in excess of the jurisdiction of the court rendering it, may be discharged by the writ of habeas corpus: Note to *Ex parte Tinsley*, ante, p. 830. Where the court has jurisdiction of the person of the defendant, and of the subject matter out of which the alleged contempt arises, he is not entitled to relief by means of this writ. It cannot be employed to bring up for review any of the facts of the case or errors of law committed at the trial: See monographic note to *Mullin v. People*, 22 Am. St. Rep. 422. In the United States, the great weight of authority is in favor of the proposition that where one is fined or committed for a contempt by a court of competent jurisdiction, he can have no appeal, or writ of error, habeas corpus, or other relief, unless by virtue of some statute: See monographic note to *Clark v. People*, 12 Am. Dec. 185.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

**DOBBINS v. MISSOURI, KANSAS, AND PACIFIC RAILWAY
COMPANY.**

[91 TEXAS, 60.]

REAL PROPERTY—TRESPASSERS—DUTY OF LAND-OWNER.—It is not the duty of a landowner to keep his property in such condition that persons, whether children or adults, going thereon without his invitation may not be injured.

NEGLIGENCE WHERE NO DUTY IS IMPOSED.—In cases where no duty is imposed, the question of negligence is not reached, for negligence can, in law, only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby.

REAL PROPERTY—POOL OF WATER NEAR RAILWAY PLATFORM—DEATH OF CHILD—LIABILITY OF RAILROAD COMPANY.—Although a railway company allows a pool of water, several feet deep, to accumulate from a ditch near its platform, and a child falls therein and is drowned, the company is not answerable, even where the pool is near a path and plank across the ditch, used for access to and from the platform, by persons having business connected, in some way, with the company, if there is no evidence to show by what route the child reached the pool.

REAL PROPERTY—INCLOSURE OF POOLS—LEGISLATIVE POWER AND DUTY.—As a police measure, the law-making power may, and doubtless should, compel the inclosure of pools, et cetera, situated on private property, in such close proximity to thickly populated places as to be unusually attractive and dangerous. When such a duty is imposed, the courts may properly enforce it, or allow damages for its breach, but not before.

RAILROADS—INTERFERING WITH DRAINAGE—CONSTRUCTION OF STATUTE.—A statute, the object of which is to prevent a railroad company from unnecessarily interfering with the natural drainage of the land on either side of its right of way, does not require the company to prevent the accumulation of water in excavations made, from time to time, on its right of way.

Parks & Carden, for the plaintiff in error.

Alexander, Clark & Hall, for the defendant in error.

⁶¹ DENMAN, A. J. Prior to the construction of the roadbed of defendant in error there was, several hundred yards north of the point where Letot station is now situated, a depression from the east to the west which carried off storm water from the surrounding lands. Said roadbed having been constructed north and south across this depression without the necessary culverts and sluices to carry off such water, it was in its course westward diverted by the roadbed and compelled to run south in the excavation made on the right of way on the east side of the track in building the road. In its course it passed along by the section-house, thence on by the plank platform provided by the company for the reception and discharge of passengers and freight at said station, cutting a ditch several feet deep and forming within two or three feet of the platform a pool of water several feet deep. From this platform a path led to a store and postoffice across the ditch, which was crossed within ten feet of said pool of water on some plank placed there by the company, such pathway being generally used by persons going to and from the platform. There were several houses near the pool, one of which was the company's section-house about two hundred feet therefrom, in which plaintiff Dobbins lived. The ditch above described ran between this section-house and the track, and there was another running on the other side of the house, the two ditches uniting before reaching the pool. Plaintiff's child, less than three years old, escaped alone from the section-house, under circumstances warranting a finding by the jury that neither he nor his wife was guilty of negligence, and a short time thereafter was found drowned in the pool. From a judgment in favor of plaintiff for damages resulting from the death of the child the company appealed to the court of civil appeals, where the judgment of the trial court was reversed and the cause remanded on the ground that there was "no phase of the evidence which justified a verdict for the plaintiff, and the court should have so instructed the jury."

Plaintiff has brought the cause to this court upon writ of error complaining of said holding of the court of civil appeals and alleging in order to give jurisdiction to this court "that the judgment of the court of civil appeals reversing the judgment of the district court herein practically settles the case, and petitioner's attorneys here and now state ⁶² that the decision of the court of

civil appeals practically settles the case, and petitioner further says that no proof other than that made on the trial of this cause in the district court can be produced upon another trial and that no different evidence nor better evidence can be produced on another trial of this case than was produced on the trial in the district court."

In addition to the facts above stated there was evidence from which the jury could have found that the pool at its nearest point was not over two feet from the path, that there was a thickly-settled neighborhood around the station, that the pool was attractive and dangerous to little children of the age of deceased, that such children, including deceased, had before often played around same, that no precautions were taken by the company to prevent such children from getting into it, that the company was some time before the accident informed of such facts and requested by plaintiff to remove the pool, which was not done. There is no evidence in the record from which the jury could have concluded that the child was or had been traveling or attempting to travel said path at or just before it got into the pool. There is no evidence of any passway from the section-house nor is there any evidence tending to show by what route the child reached the pool. There is no evidence that said path was used or intended to be used by anyone other than those going to and from the platform upon business in some way connected with the company.

The common law imposes no duty upon the owner to use care to keep his property in such condition that persons going thereon without his invitation may not be injured. In considering the question as to whether a duty exists, there is no distinction between a case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former. If there be no duty the question of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby. Since the common law imposes no duty on the railroad to use care to keep its right of way in such condition that the persons going thereon without its invitation may not be injured, and since there is no evidence in the record from which the jury could have found such an invitation to the child, it was no more liable in law for its death than would have been a neighbor had it wandered into his uninclosed lands and been drowned in his tank or creek or been killed by falling down

his precipice. Since the principles above stated have been so fully and ably discussed heretofore by many learned jurists, we deem it unnecessary to undertake to elaborate them, but will content ourselves by referring to the opinion of the court of civil appeals and the following cases decided upon similar facts: *Hargreaves v. Deacon*, 25 Mich. 1; *Missouri etc. Ry. Co. v. Edwards*, 90 Tex. 65; *Moran v. Pullman etc. Co.*, 134 Mo. 641; 56 Am. St. Rep. 543; *Charlebois v. Gogebic etc. R. R. Co.*, 91 Mich. 59; *Clark v. Manchester*, 62 N. H. 577; *Green v. Linton*, 7 Misc. Rep. 279; 27 N. Y. Supp. 891; *Murphy v. Brooklyn*, 118 N. Y. 575; *Witte v. Stifel*, 126 Mo. 295; 47 Am. St. Rep. 668; *Galligan v. Metacomet Mfg. Co.*, 143 Mass. 527; *O'Connor v. Illinois Cent. R. R. Co.*, 44 La. Ann. 339; *Richards v. Connell*, 45 Neb. 467; *Benson v. Baltimore Traction Co.*, 77 Md. 535; 39 Am. St. Rep. 436; *Sterger v. Van Sicklen*, 132 N. Y. 499; 28 Am. St. Rep. 594; *Frost v. Eastern R. R. Co.*, 64 N. H. 220; 10 Am. St. Rep. 396; *Klix v. Nieman*, 68 Wis. 271; 60 Am. Rep. 854; *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611; *Clark v. Richmond*, 83 Va. 355; 5 Am. St. Rep. 281; *Ratte v. Dawson*, 50 Minn. 450; *Indianapolis v. Emmelman*, 108 Ind. 530; 58 Am. Rep. 65.

We are aware that there are cases asserting a contrary doctrine, but do not think they are based upon sound principle. They rest mainly upon *Railroad Co. v. Stout* (1873), 17 Wall. 657, and cases following same known as the "turntable cases." In the *Stout* case there were three questions to be determined: 1. Did the law impose upon the company a duty to use care to keep its property in such condition that persons going thereon without its invitation would not be injured? 2. Was the child six years old guilty of contributory negligence? and 3. Was the company guilty of negligence in leaving the turntable unlocked? The first and most important question, without an affirmative answer to which the third could not arise, was not even referred to, and, if we may judge from the opinion, that learned court's attention was not called to its presence in the case; the second was admitted by the railroad in favor of plaintiff; and the third, if the first were determined in the affirmative, was clearly a disputed question of fact which the court correctly held was settled by the verdict. The main force of the opinion is spent upon this third question in attempting to show that the evidence was of such a character that the jury were satisfied in finding that the company had not used such care in guarding the turntable as a reasonably prudent person would have done under sim-

ilar circumstances. There could have been no doubt upon this question. The opinion of the court would have been much more satisfactory if it had undertaken to establish instead of assuming the affirmative of the first question. If a child go uninvited upon a neighbor's property and be drowned in his tank, creek, or river, or fall off his fence, woodpile, haystack, or precipice, or is injured while playing with his cane-mill or cornsheller, and the courts assume the affirmative of the first question above stated, as was done in the Stout case, the jury would in most cases be warranted in finding that the neighbor had not used reasonable care to so guard his tank, et cetera, or lock his cane-mill or cornsheller as to avoid such injury. Under this new doctrine the question as to whether the tank, et cetera, or the cane-mill, et cetera, was attractive and dangerous to the child would be for the jury, and they could as truthfully say it was as they could of the turntable; for our common experience as well as the reported cases demonstrate that a great many more children lose their lives by such means than upon turntables. This logical extension or rather application of the doctrine of the Stout case has recently found expression in ⁶⁴ the case of *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, where a verdict and judgment holding the owner of a lot in the city, upon which there was a pool of water, liable for the death of a boy who went there uninvited and was drowned, was upheld, the court, after assuming the existence of the duty as was done in the Stout case, saying: "The question, whether a defendant has or has not been guilty of negligence in case of such an accident upon his land to a child of tender years, is for the jury. Involved in this question is the further question whether or not the premises were sufficiently attractive to entice children into danger, and to suggest to the defendant the probability of the occurrence of such an accident; and, therefore, such further question is also a matter to be determined by the jury: *Mackey v. Vicksburg*, 64 Miss. 777; *Railroad Co. v. Stout*, 17 Wall. 657. The subject of the attractiveness of the premises was submitted to the jury by the instructions given for the plaintiff in the case at bar": See, also, *Stendal v. Boyd*, 67 Minn. 279; Am. Neg. Rep. 94, affirming such a judgment without discussion on authority of the "turntable cases"; *Bransom v. Labrot*, 81 Ky. 638; *Brinkley Car Works etc. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216. The difficulty about these cases is that they either impose upon owners of property a duty not before imposed by law or they leave to a jury to find legal negli-

gence in cases where there is no legal duty to exercise care. In these cases the courts, yielding to the hardships of individual instances where owners have been guilty of moral though not legal wrongs in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law and assumed legislative functions in imposing a duty where none existed. As a police measure the law-making power may and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, et cetera, situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal and civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed the courts may properly enforce it or allow damages for its breach, but not before.

We do not wish to be understood as holding that one is not liable for injuries to persons going onto his land uninvited when such injuries are intentionally inflicted, e. g., where a pit is sunk or a gun is set on one's land to injure trespassers. In such cases, the liability is based upon the breach of the duty imposed by law not to intentionally injure even a trespasser—and such intent may be evidenced by circumstances, as where one secretly digs a pit across a pathway over his land where he has reason to believe another will pass at night. In such cases, the liability is not based upon the assumption that the owner owes a duty to the uninvited person to keep his premises reasonably safe, but upon the fact that he owes a duty to such person not to intentionally injure him. The failure to observe this distinction has led to much confusion.

⁶⁵ But plaintiff in error contends that article 4436 of the Revised Statutes, which reads as follows: "In no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof," imposed upon the company the duty of preventing the accumulation of water on its right of way. The object of this statute was to prevent the railroad from unnecessarily interfering with the natural drainage of the land on either side of its right of way. The words "for the necessary drainage thereof" express the purpose of the statute, and "thereof" refers to "land." It was not intended to compel the railroad to so leave and maintain the ex-

cavations made from time to time on its right of way in such condition is to prevent the accumulation of water therein. While such a requirement might be just in some places, it would be so very burdensome when applied to all portions of the road, as this statute was evidently intended, that courts should not construe it as imposing the duty contended for by plaintiff in error in the absence of language plainly expressing such intention on the part of the law-making power. We do not regard *Rosenthal v. Taylor etc. Ry. Co.*, 79 Tex. 325, as in conflict with the construction here given to the statute. There the water was backed up onto the adjoining land, and was allowed to remain until it became stagnant and offensive. The condition of the water was a nuisance interfering with Rosenthal in the enjoyment of his property, and the company would have been liable at common law for that reason if the water had been confined to its right of way. The fact that the company so constructed its roadbed as to violate the statute by backing the water over the adjoining land aggravated and increased the nuisance, for even pure water thus backed upon his lots became a nuisance.

The case before us is not within the rule of law imposing upon the owner the duty not to permit any dangerous excavation to remain on his own land so near a street or highway as to injure persons who, while attempting to follow the same, may by mishap fall therein, because: 1. There is no evidence tending to show that the child was at the time of the accident traveling or attempting to travel the path, and such duty is not imposed as to persons who approach the excavation by any other route; and 2. The path not being a public road but merely for the use of persons going to and from the platform on business connected in some way with the company, the invitation to use it would probably not apply to the child in this case and therefore the law did not impose the duty above mentioned on the railroad as to it—such duty being imposed only as to persons thus invited to use the path.

Being of opinion that the court of civil appeals did not err in reversing and remanding the cause on the ground above stated, it becomes our duty under the statute to here enter judgment that plaintiff in error take nothing by his suit, which is accordingly done.

Affirmed and judgment rendered.

REAL PROPERTY — NEGLIGENCE — TRESPASSERS. — The owner of land is ordinarily under no duty to keep his premises safe for trespassers; and if a pond of water exists on premises adjacent

to a public highway, or is created there by the action of a municipality in grading a street, the landowner is not answerable for the death of a child which goes to such pond without invitation, and is drowned therein: *Peters v. Bowman*, 115 Cal. 345; 56 Am. St. Rep. 106, and note; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641; 56 Am. St. Rep. 543, and note. Another view is that unguarded excavations supplied with dangerous attractions are regarded as holding out an implied invitation to children, which will make the owner of the premises liable for injuries to them, even though they be technical trespassers: Note to *Price v. Atchison Water Co.*, 62 Am. St. Rep. 631. As to landowner's liability for injuries caused by excavations dug dangerously near to a highway, see *Daneck v. Pennsylvania R. R. Co.*, 59 N. J. L. 415; 59 Am. St. Rep. 613, and note.

OXSHEER v. WATT.

[91 TEXAS, 124.]

CHATTEL MORTGAGE—GIVING POWER TO SELECT SUBJECTS OF.—A chattel mortgage is not void for want of identity and description of the property mortgaged, if the instrument, though containing no specific descriptive matter, yet confers an implied power to select the identical property mortgaged from other property of a like character and description.

CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION—SELECTION BY MORTGAGEE.—If a mortgagor has a herd of three hundred mares branded, "F2," a chattel mortgage of "Fifty (50) mares branded F2" furnishes no descriptive matter which, when applied to the herd, will enable one to ascertain the very animals intended to be conveyed, but it does confer an implied right upon the mortgagee to select the fifty mares from the three hundred, and is, therefore, valid as to the matter of description.

CHATTEL MORTGAGE—TIME OF ELECTION—FORECLOSURE.—If it is necessary for a mortgagee of fifty mares, branded "F2," to select the animals from a herd of three hundred mares in that brand, before the property mortgaged can be identified, it would be better to require the selection to be made before, or at the time of, the foreclosure of the instrument, but neither the mortgagor nor a purchaser with notice can complain of a decree foreclosing upon fifty average head of the whole number.

Harris & Saunders, for the appellant.

R. I. Monroe and J. R. Downs, for the appellee.

¹²⁴ DENMAN, A. J. In this case, the court of civil appeals has certified the following explanatory statement and questions, to wit:

"This suit was brought by the appellee, W. T. Watt, August 16, ¹²⁵ 1895, against F. G. Oxsheer, J. T. Beall, and W. W. Oxsheer upon two promissory notes and to foreclose a deed of trust or mortgage made to secure their payment. F. G. Oxsheer and Beall are sued as makers of the notes, and W. W. Oxsheer as

party in possession of the property mortgaged, the same being personal property, and upon the ground that he has other personal property of like description with that mortgaged, all in one pasture and not distinguishable therefrom, and that before the mortgage can be foreclosed plaintiff has reason to believe W. W. Oxsheer will have sold the greater part, or all, of the mortgaged property.

"The property mortgaged and conveyed to the trustee by F. G. Oxsheer is described as follows: 'Fifty (50) mares branded F2.' There is no additional description or means of identification in the mortgage. It is dated April 10, 1891.

"At the time the mortgage was executed, F. G. Oxsheer had about three hundred mares in the F2 brand.

"W. W. Oxsheer claimed all the three hundred mares in the F2 and other stock owned by F. G. Oxsheer, January 16, 1892, under the following title: On that date, F. G. Oxsheer made a deed of trust to Scott Field, trustee, conveying all his stock, including all the mares in the F2 brand, to secure J. H. Drennan, or to indemnify him as surety for F. G. Oxsheer on two notes aggregating twelve thousand dollars, for which amount F. G. Oxsheer had executed to Drennan his two notes. The property was sold by the trustee pursuant to the deed of trust, on the thirty-first day of January, 1893, to pay the unpaid indebtedness of F. G. Oxsheer to Drennan, amounting to five thousand eight hundred and nine dollars and ninety cents, and W. W. Oxsheer bought the property at the sale, paying at the time five thousand eight hundred and nine dollars and ninety cents. Bill of sale was executed by the trustee, at the time, to W. W. Oxsheer, pursuant to the sale.

"For a recited consideration of eighteen thousand dollars, on the fourth day of August, 1891, F. G. Oxsheer conveyed by bill of sale to W. W. Oxsheer, who was F. G.'s father, all his stock of horses, mares, et cetera, including the three hundred mares in the F2 brand, describing the stock, being the same described in the Drennan deed of trust; Drennan at the time having an unrecorded mortgage on the same stock to indemnify him as surety on the two notes before referred to. It was understood at the time that W. W. Oxsheer would assume the payment of the two notes. The bill of sale by F. G. to W. W. Oxsheer was absolute and not subject to the mortgage to secure Drennan. At the same time of the mortgage to Drennan, F. G. Oxsheer executed to his father, W. W. Oxsheer, a second mortgage, subject to the

Drennan mortgage, to secure W. W. Oxsheer in payment of fifteen thousand six hundred and twelve dollars and forty-seven cents. On the same day prior to the deed of trust to secure Drennan, W. W. Oxsheer reconveyed back to his son, F. G. Oxsheer, all the stock formerly transferred to him by his son. This was done in order to make good the security to Drennan, and because he did not wish to pay the two notes he had assumed.

"At the time of the sale by the younger to the elder Oxsheer, the former was indebted to the latter in at least the eighteen thousand dollars, the recited consideration ¹²⁰ of the transfer, for loaned money and money paid for him on security debts.

"On the nineteenth day of October, 1891, W. W. Oxsheer, by his agent Smith, wrote a letter to W. T. Watt, plaintiff, stating that he had purchased the F2 stock of horses, and asked permission to move the stock from the Taylor county pasture to the Nolan county pasture, as the grass was better there and the horses would winter better. The permission was granted and the stock moved to Nolan county. The horses were always in the possession of F. G. Oxsheer; no possession was delivered to Watt, and no actual delivery made to W. W. Oxsheer, but F. G. Oxsheer kept possession of them and managed them as agent of his father after the sale under the Drennan deed of trust. W. W. Oxsheer, at the time of his purchase at such sale, and at the time he obtained permission to move the stock to Nolan county, knew of the mortgage to Watt.

"Watt has never seen the mares mortgaged to him. The only knowledge he had of the mares mortgaged to him was at the time his mortgage was executed and was from what F. G. Oxsheer told him, and he told him that they were in Taylor county, and told him he had fifty mares branded F2 in Taylor county. Watt did not know Oxsheer had more than fifty, or whether he had any mares at all, but supposed that he had a considerable number more than fifty, as he, Oxsheer, was a stock man, and from his reputation as such. The mortgage to Watt was executed in the Provident National Bank in Waco.

"At the time the mortgage to Watt was given F. G. Oxsheer had three hundred mares in the F2 brand. He had had them in Haskell county, and some time during the spring of 1891 they were moved to Taylor county and were put in what was known as the old 'Dee grounds' pasture. A part of them were not moved but remained in Haskell county. At the time of the mortgage to Watt nothing had been done to separate or distinguish the mares intended to be mortgaged from other mares in

the same brand. It is not shown that there were only the fifty head of mares in Taylor county at the time of the mortgage, nor that there were less than that number, and the testimony does not identify the mares mortgaged, or so describe them as that they could then or now be separated from others in the same brand. Since their removal to Nolan county the stock in the brand F2 have been kept together.

"The questions we certify to the supreme court are: Construed with the facts stated showing that there were three hundred mares in the F2 brand, and with other facts attempting to identify the mortgaged property, was the mortgage void for want of identity and description of the property mortgaged? And can the mortgage be foreclosed in the proceedings against W. W. Oxsheer, who had notice at the inception of his claim of the plaintiff's mortgage, on an undivided interest of fifty average head of the whole number."

It will be observed that the certificate does not give the substance of the trust deed executed by F. G. Oxsheer to the trustee on the "Fifty ¹²⁷ (50) mares branded F2" to secure the notes due Watt. We will assume that it is in the ordinary form conveying the property to the trustee to secure the notes, with power to sell to pay the debt evidenced thereby when due. Such instrument, read in the light of the circumstances above stated, surrounding its execution, evidences an intention on the part of the parties thereto of fixing a lien, not upon an undivided interest in the herd of "three hundred mares in the F2 brand," but upon fifty of them. In order to give effect to such intent, there must be found in the instrument either: 1. Some descriptive matter, which, when applied to the herd, will enable one to ascertain the very animals intended to be conveyed; or 2. An express or implied power of selection or, in legal terminology, "election." Since the entire herd were branded "F2," it is clear that the trust deed conveying "Fifty (50) mares branded F2," furnishes no descriptive matter which, when applied to the herd, will enable one to ascertain the very animals intended to be conveyed"; and we do not understand that there is any claim that the instrument contains an "express power" of election. This brings us to the real question before us, Does it carry upon its face, an "implied power" of election? We are of the opinion that it does, and for that reason, it is not void. In reporting Heywood's case, Coke, in stating the rules of law governing "election," as an illustration of his fourth rule, says: "But if I give you one of my horses in my stable, there you shall have

election and, if one grant to another twenty loads of hazel, or twenty loads of maple, to be taken in his woods of D; there the grantee shall have election": Heywood's case, 2 Coke on Littleton, 145; Bacon's Abridgment, Election (B). The first of these examples of implied power of election given by these great jurists seems to be taken from *Mervyn v. Lyds*, Dyer, 91, where it is said: "But admit their power and ability to make the sale, then we must see what thing and what number of trees are sold, for the words are 'all those their woods and trees which then might reasonably be spared.' What manner of certainty is in these words, and who shall be the judge of the sparing, the vendor or the vendee? And it seems neither of them; yet by common intendment, the vendor has more knowledge of the necessity of trees being preserved, and which may be spared as superfluous, to the maintenance of the inheritance. And it is, like a gift made by me of all those my horses which may be best spared; this is void for want of certain pointing out or assignment; but if I give you one of my horses, although that be uncertain, yet by your election that may be made a good gift." In *Palmer's case*, 5 Coke, 24, Palmer having sold six hundred cords of wood to be taken out of his forest upon his own assignment, and having refused when called upon to assign or designate the wood, it was held that the grantee had the right to select same, "for the grantor cannot, by his own act, or default, either subvert, or derogate from his grant." In Bacon's Abridgment, Election (A), it is said: "If a man grants twenty acres, parcel of his manor, without any other description of them, yet the grant is not void, for an acre is a thing certain, and the situation may be reduced to a certainty by the ¹²⁸ election of the grantee." In *Wofford v. McKenna*, 23 Tex. 46, this court, through Wheeler, chief justice, say: "A grant by the owner of a certain number of acres in a particular tract would confer a right of election upon the grantee, and authorize him to locate the quantity in any part of the tract he saw proper to elect, upon the principle that a conveyance must be held to pass some interest, if such effect may be given to it consistently with the rules of law, and that, if uncertain or ambiguous, it must be construed most strongly against the grantor." In *Call v. Gray*, 37 N. H. 428, 75 Am. Dec. 141, it was contended that a mortgage of a certain number of beds, chairs, et cetera, without any further designation, in a house containing many other articles of the same kind, was void because the instrument contained no description by which the property intended to be mortgaged could be desig-

nated, but the court held it valid, saying: "The doctrine is same as that which prevails in conveyance of real estate—that the grant shall be taken most strongly against the grantor. . . . The mortgagor had nothing further to do to make the mortgage perfect, and the plaintiff had the right to make a selection of the articles. The mortgage, then, so far as the instrument itself went, was legal between the parties." We therefore answer the first question in the negative: *Elliott v. Long*, 77 Tex. 467; *Leighton v. Stuart*, 19 Neb. 546; *Frost v. Citizens' Nat. Bank*, 68 Wis. 234.

The facts certified do not show that W. W. Oxsheer is in any better position to prevent the foreclosure than F. G. Oxsheer would have been had the title not passed out of him. While it would have been more regular for the court to have required the exercise of the power of election before or as part of the foreclosure proceedings, and then to have ordered the sale of the mares selected, we do not see that W. W. Oxsheer is prejudiced by a foreclosure on average mares, and so answer the second question.

We are aware that there are many cases seeming to hold such instruments void for want of description. In some of them the question was one of notice; in others there was no facts stated in the instrument from which the bulk of things, out of which was to be taken the smaller number intended to be mortgaged could be identified; in most of them the real question was whether title passed by the instrument; while in others the doctrine of election above adverted to seems not to have been considered. In cases where it is necessary for a party to show title an instrument with such a description would not avail him without an election, for "where the things are several, nothing passes before election," and "therefore if I have three horses, and I give you one of my horses, in this case the election ought to be made in the life of the parties, for inasmuch as none of the horses is given in certain, the certainty and thereby the property begins by election": *Heywood's case*, 2 Coke, 37. The distinction between such cases and the one before us is referred to in *Call v. Gray*, 37 N. H. 428, 75 Am. Dec. 141, where it is said: "The cases which show that trespass and trover cannot be maintained until the property is separated and identified depend upon the principle that property in the particular ¹²⁹ articles is indispensable, in order to sustain those actions. If specific articles are alleged to have been converted or injured, the plaintiff must show such articles to be his. . . . And the question

in this case is, not as to the plaintiff's right to maintain trespass or trover, but as to the effect of the mortgage."

CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION. Any description in a chattel mortgage which will enable third persons to identify the property, aided by inquiries which the mortgage indicates and directs, is sufficient: *Note to State Bank v. Felt*, 61 Am. St. Rep. 256; *Andregg v. Brunskill*, 87 Iowa, 351; 43 Am. St. Rep. 388; *Golden v. Cockril*, 1 Kan. 259; 81 Am. Dec. 510. As a general rule, a mortgage of a specified number of articles out of a larger number is not good as against creditors of the mortgagor or others acquiring adverse rights, unless it furnishes the data for separating the mortgaged property from the mass of articles; and a mortgage of "one hundred and twenty-four head of mules now in the territory of Kansas," and "one pair of clay-bank horses," without any other description, has been held void for uncertainty, as it does not distinguish the property from other similar property, or enable third persons to identify it by inquiry: See monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 243, on the sufficiency of description of property in chattel mortgages. A chattel mortgage which leaves the designation of the specific property mentioned therein resting exclusively in the minds of the parties fails to meet the purposes and requirements of the law, and is void for indefiniteness: *Parker v. Chase*, 62 Vt. 206; 22 Am. St. Rep. 99. A mortgage of chattels describing them as two two-year-old heifers and three one-year-old heifers is void for indefiniteness where it does not appear that the mortgagor did not own other heifers of the same age: *Huse v. Estabrooks*, 67 Vt. 223; 48 Am. St. Rep. 810.

WESTERN UNION TELEGRAPH COMPANY v. LUCK.

[91 TEXAS, 178.]

TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGES—MENTAL SUFFERING AS AN ELEMENT OF DAMAGES.—A telegram sent by a sick man's wife to her daughter, as follows: "To Bertha Wlucker. Luck is very sick; come home at once. Mina Luck"—is not notice to the telegraph company that the addressee is the daughter of the sender of the message. Hence, if the telegram is delayed, and the sick man's death and funeral take place before the daughter arrives, the company, having no notice of anything which would bring about suffering on the part of the wife, is not answerable in damages for her mental suffering and distress, caused by a want of the consoling presence of her daughter at the burial, where she would have been present at the funeral, but could not have been present at the death, if the message had not been delayed.

JURISDICTION—REMOVAL AND REMANDING OF CAUSE—APPEAL.—The federal courts are the exclusive judges of their own jurisdiction. Hence the action of a circuit court of the United States in remanding a cause removed thereto from a district court of the state is conclusive; and the action of the state court in then taking jurisdiction is not reviewable on appeal.

John A. Green, Sr., for the appellant.

W. L. Evans and J. M. Goggin, for the appellee.

¹⁷⁹ BROWN, A. J. We copy the facts as found by the court of civil appeals:

The following telegram was, on August 3, 1891, delivered by transmission from San Antonio to Eagle Pass, at 8 o'clock, P. M., and received at Eagle Pass at about 9:25 P. M.

"To Bertha Wincker, care A. J. Ladner, Eagle Pass.

"Luck is very sick; come home at once.

"MINA LUCK."

Mina Luck was the wife of the sick man, and Bertha was her daughter. The latter, if the message had been delivered before 2:25 A. M., could have taken the train that left at that hour for San Antonio and arrived there the same morning, in time to have been with the mother during that day. Luck died during the night on which the message was sent and before Bertha could have arrived, and was buried in the afternoon of the 4th. By not getting the telegram in time to have taken the said 2:25 train, she was delayed twenty-four hours, not reaching San Antonio until the morning of the 5th.

The action was brought by Mina Luck and Bertha Wincker for damages for mental anguish, for failure to promptly deliver the message, each claiming damages in the sum of five thousand dollars. The latter was dismissed from the case, and the amended petition changed the prayer for damages for mental distress suffered by Mina Luck to two thousand dollars. It is not questioned that the petition stated a case, except as referred to in the second assignment of error. The verdict was in favor of plaintiff for five hundred dollars.

After a careful review of the authorities, this court, in the case of Western Union Tel. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, stated its conclusions thus:

"In the case now before the court, the message was addressed to W. S. Carter, and notified the company that Gorsuch was dead; that Carter was in all probability a near relative with 'a serious interest' in the intelligence communicated and in all probability upon the receipt of the message would set out at once to attend the funeral and to care for ¹⁸⁰ the remains. The probable purpose of adding the word 'answer' was to learn whether or not the message was delivered, and whether or not the party addressed would be able to arrive in time to attend the burial or to direct it.

"From the rules laid down in the foregoing decisions of this court, this plain and just rule may be deduced: The telegraph

company is chargeable with notice of the relationship that exists, if any, between all parties named in the message, and with notice of such purposes as may be reasonably inferred from the language used, in connection with the subject matter of the communication, taking into consideration the usual manner of expressing messages sent by this means."

Applying the rules stated above, the message before us charged the telegraph company with notice that Bertha Wincker was a near relative of the sick man, Luck, and that in all probability, upon receiving the message, she would set out to visit him. The purpose of sending the telegram, as it appeared from the message, was to afford Bertha Wincker an opportunity to see Luck, the person mentioned in the message, before his death, to be with him in his illness, and to be present at his funeral in case of his death. These apparent facts may not in reality have existed, but, so far as the telegraph company was concerned, they were to be treated and taken as true. If Bertha Wincker had been a daughter or other near relative of Luck, and the telegram had not been delivered to her within a reasonable time, she would have been entitled to recover damages, not because she failed to reach the place designated in time to be with her mother, Mina Luck, and console her in her distress, but because of the mental anguish of Bertha Wincker as a relative of the man, Luck.

It is sought in this action to place upon the message the construction that it notified the telegraph company of the relationship between Mina Luck and Bertha Wincker, and also that the message notified the telegraph company that the purpose of sending it was to summon the daughter to attend the mother in her distress and for her consolation. The construction first stated, that the company must have taken notice that Bertha Wincker was a near relative of Luck, is well established by the decisions of the courts of this state, and we think that it is not consistent to hold that the message had the effect to give notice to the telegraph company of the claim of Bertha Wincker as a relative of Luck, and of the claim of Mina Luck as the mother of Bertha Wincker. The person addressed is held as matter of law to be interested; the sender oftentimes is not in fact interested.

In the case of *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 27 Am. St. Rep. 914, it was held that a telegram by a mother to her son, stating that the stepfather of the person addressed was dead, was sufficient to put the telegraph company on notice that

the message was intended as a summons to the son to attend the mother in her distress; but we believe that that case is not sustained upon principle nor upon any authority, and it is therefore overruled.

¹⁸¹ The telegram under consideration was sufficient to call the attention of the telegraph company to the consequences which might be expected to follow a failure to deliver the message from Mina Luck to Bertha Wincker, which the law holds to be that the party addressed, having a serious interest in the condition of the person named as sick, and being a near relative, upon a failure to attend him in his sickness or to arrive before his death and burial, would suffer mental anguish in consequence of the negligence of the telegraph company. But can it be said, under any rule of law, as a natural consequence of the failure to deliver the message, and the failure of Bertha Wincker to arrive before the burial of Luck, Mina Luck would suffer mental anguish for want of the consoling presence of her daughter, Bertha Wincker? Could the telegraph company have anticipated such a result from a failure to deliver the message? We think that it could not; and that having no notice of the peculiar circumstances, if any existed, which would bring about suffering on the part of Mina Luck, she cannot recover in this case against the company on account of the failure to deliver the message: *Western Union Tel. Co. v. Coffin*, 88 Tex. 94.

The mental anguish endured by Mina Luck on account of the absence of her daughter does not fall within the rule laid down by this court in any former cases, except the one of *Western Union Tel. Co. v. Nations*, 82 Tex. 539; 27 Am. St. Rep. 914. This is more analogous to the case of *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, in which this court held that the mental anguish occasioned by the delay in delivering a telegram conveying information that the mother of the party addressed was convalescent, furnished no ground for recovery against the telegraph company.

The circuit court of the United States having remanded this cause to the state court, its judgment is final and not subject to revision by this court: *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556. In the case cited the railroad company removed the cause to the United States circuit court, which remanded it. The state court retained jurisdiction, and upon writ of error to the supreme court of the United States, that court said: "The supreme court of Nebraska rightly recognized the courts of the United States to be exclusive judges of their own jurisdiction,

and declined to review the order of the circuit court. There was no error in the district court's exercising jurisdiction over the case. For the error of the district court in overruling the demurrer to plaintiff's petition, the judgments of the district court and court of civil appeals are reversed, and the cause remanded.

DELAY IN DELIVERING TELEGRAM—DAMAGES FOR MENTAL SUFFERING.—In *Western Union Tel. Co. v. Edmondson*, 91 Tex. 206, it was held that the mental anguish and suspense of Mrs. Edmondson caused by the tardy delivery of a message announcing her father's sickness, and which delayed her twenty-four hours in starting, by rail, to see him, was not such damage as could be reasonably anticipated by the parties, and that there could be no recovery therefor. Her father's death and burial occurred before she could have arrived at his home, if the telegram had been promptly delivered. The telegram to Mrs. Edmondson read as follows: "Your father was struck with paralysis this morning. Come to Clifton." Mrs. Edmondson suffered much mental anguish on account of the suspense in not being able to hear what her father's condition was during such delay of twenty-four hours, and suit was brought for damages arising from the mental suffering occasioned by the suspense in not knowing the condition of her father during the time that she was delayed. It was admitted that, if the message had been promptly delivered, the same state of anxiety would have existed up to the time she would have arrived at Clifton on her way to her father's home. Clifton was the station to which Mrs. Edmondson was requested to come, and from which she had to take a private conveyance to reach her destination. It was claimed, however, that Mrs. Edmondson's mental anguish and suspense beyond the time that she would have arrived at Clifton was caused by the failure of the telegraph company to perform its contract and deliver the message in a reasonable time.

In rendering the opinion of the court, Brown, associate justice, said: "In the case of *Rowell v. Western Union Tel. Co.*, 75 Tex. 28, this court held that continued anxiety caused by failure to deliver a message did not constitute a cause of action against the telegraph company. It is claimed, however, that there is a distinction between that case and the one before the court, and that this case should not be governed by the rule laid down in *Rowell v. Western Union Tel. Co.*, 75 Tex. 28. In that case, the plaintiff's wife had received a message announcing the sickness of her mother and advising her to come. In reply, the husband sent a message inquiring as to the condition of the mother, and stating that if she was no better, his wife would come at once; an answer was placed with the telegraph company, informing the husband that the mother of his wife was not in a dangerous condition, but the last message was never delivered, and the wife of the plaintiff was in great suspense as to the condition of her mother, for which the suit was brought. It will be observed that, in that case, the purpose of sending the message by the husband was to obtain information as to the then condition of his wife's mother, and the purpose of the message which was not delivered was to impart that information; consequently, the failure to deliver the last message directly caused the continued suspense and anxiety of the wife by frustrating the very purpose which the parties had in sending the last two messages. Notwithstanding this, this court held that continued suspense and anxiety of the daughter as to the condition of the mother did not give a

right of action for damages, and we see no reason to overrule or modify that decision.

"The case before the court is not so strong for the plaintiff as was the case of *Rowell v. Western Union Tel. Co.*, 75 Tex. 28. In this case, the purpose of sending the telegram was to inform Mrs. Edmondson of the illness of her father and to afford her the opportunity of going to him and of being with him in his affliction, and to be present at his funeral in case of his death. It was not the purpose of sending the telegram to keep her informed as to the condition of her father from the time that she received it until she should arrive at some place where she would acquire information as to his condition.

"In *Rowell v. Western Union Tel. Co.*, 75 Tex. 28, cited above, Judge Gaines, speaking for the court, said: 'We are of the opinion that the demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be held an element of the damages resulting from the breach. For injury to the feelings, in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation.' This language applies with equal force to the facts of the case now before us. It is not true that a party is entitled to recover damages for all mental anguish which he may suffer in consequence of a failure on the part of the telegraph company to deliver a message intrusted to it for his benefit, but the measure of his recovery must be determined by the general rule of law which applies to all cases of breach of contract, which rule, as far as applicable to this case, is thus expressed: 'When two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or as may reasonably be supposed to have been in the contemplation of the parties at the time that they made the contract as the probable result of the breach of it.' Tested by this rule, the plaintiff was not entitled to recover for the suspense and mental anguish of his wife arising from the fact that she was not informed of the condition of her father between the time of receiving the message and her arrival at Clifton, because the telegram itself, considered from the standpoint of the telegraph company, would not indicate that a failure to deliver it in due time would produce any such result: that is, the suspense and mental anguish claimed to have existed cannot fairly and reasonably be considered as arising naturally and in the usual course of things from the failure to deliver the message; nor can it be reasonably supposed that the parties, at the time they made the contract, had in contemplation that, in case it was not promptly delivered, Mrs. Edmondson would suffer such anxiety and suspense because of the fact that she did not know whether her father was dead or alive. The company was notified, as a matter of law, by the terms of the telegram, that in case it failed to deliver it according to its undertaking or to exercise ordinary and reasonable care to do so, the party addressed might fail to reach the father in time to be with him during his sickness, and might, in case of his death, fail to reach his home in time to be at his funeral, and that such failure would produce, in the ordinary course of things, mental anguish: *Western Union Tel. Co. v. Carter*, 85 Tex. 580; 34 Am. St. Rep. 826; *Loper v. Western Union Tel. Co.*, 70 Tex. 689. This can reasonably be supposed to have been within the contemplation of the parties at the time they made the

contract, and it is for such results that the law holds the telegraph company liable for damages. In other words, whatever may arise, in the usual course of things, from the failure to accomplish the purpose indicated by the terms of the message may be considered within the contemplation of the parties at the time the contract was made as being the probable result of the breach of it, and for this the party who fails to comply is held responsible: *Western Union Tel. Co. v. Stiles*, 89 Tex. 312.

"The mental anguish, anxiety, and suspense suffered by Mrs. Edmondson was incident to the failure of the company to deliver the message, but was not one of the natural and usual results of such failure; and the claim based thereon does not come within the general rule laid down for ascertaining the liability of parties for breach of contracts, nor does it come under any rule announced by this court, and we have neither authority nor inclination to extend the right of recovery, in this class of cases, beyond the limits already fixed by the decisions of this court."

TELEGRAPH COMPANIES—DAMAGES—MENTAL SUFFERING.—A telegraph company is not liable for mental suffering and pain resulting from its neglect to transmit a message promptly, although advised by the contents of the message that such suffering and pain would naturally result from its failure to deliver the message without delay: *Note to Mentzer v. Western Union Tel. Co.*, 57 Am. St. Rep. 308, citing cases to the contrary; *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431; 53 Am. St. Rep. 648. Compare *Western Union Tel. Co. v. Nations*, 82 Tex. 539; 27 Am. St. Rep. 914, and monographic note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534, on mental anguish as an element of damages; also extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778, where the same subject is discussed.

TELEGRAPH COMPANIES—RELATIONSHIP—NOTICE OF, BY TERMS OF TELEGRAM.—If the terms of a message notify the telegraph company that the addressee is seriously interested in the condition of the person described therein, in case of sickness, as being "very low," the company has sufficient notice of the relationship existing between the addressee and sender; otherwise not. For illustrations, see *Western Union Tel. Co. v. Linn*, 87 Tex. 7; 47 Am. St. Rep. 58, and note.

BIOCCHI v. CASEY-SWASEY COMPANY.

[91 TEXAS, 259.]

TRUSTS—FRAUD—MORAL OBLIGATION TO RECONVEY. Courts of equity recognize that there is a moral obligation resting upon a fraudulent grantee, who has promised to reconvey, to execute his trust, and, although they will not enforce its execution, they will uphold it when performed.

TRUSTS—FRAUD—CONSIDERATION FOR RECONVEYANCE.—When a fraudulent grantee has, in compliance with his verbal agreement, made a reconveyance of the property to the fraudulent grantor, the moral obligation under which he placed himself to make this reconveyance is a valuable and sufficient consideration to support the deed of reconveyance.

TRUSTS—FRAUDULENT TRUSTEE—RIGHTS OF HIS CREDITORS.—While the legal title to property remains in a fraudulent grantee, his creditors may subject it to the payment of their debts, by proper legal proceedings, but, if the fraudulent grantee reconveys to the fraudulent grantor, before any lien attaches in

favor of the creditors of the former, they cannot subject the property to the payment of their debts.

TRUSTS—FRAUD—ESTOPPEL TO DENY RIGHTS OF TRUSTEE'S CREDITORS.—A fraudulent grantor after a reconveyance under a promise to do so is not estopped to deny the rights of creditors of the fraudulent grantee because the title was permitted to remain in the name of the grantee, or because the grantee represented the property to be his own, and obtained credit upon faith of the ownership.

TRUSTS—FRAUD—PREFERRING CREDITORS—RECONVEYANCE IS VALID AS AGAINST CREDITORS OF TRUSTEE. A debtor may prefer a creditor, if done in good faith, and, in the same way, may execute a trust to the prejudice of creditors. Hence, if a fraudulent grantee conveys the property to the fraudulent grantor in compliance with his agreement to do so, the conveyance is good, although the grantee intended to defraud his own creditors, by making such conveyance, because the moral obligation which he owed to the grantor to convey the property to him in execution of the trust was equal to his obligation to his creditors to pay their debts. Such a deed could not be held to be fraudulent, and fraud practiced in creating the debts could not avoid the deed thus made.

TRUSTS—FRAUDULENT INTENT—RIGHTS OF TRUSTEE'S CREDITORS.—If a fraudulent grantee holds property in secret trust for a fraudulent grantor, the rights of the grantee's creditors must be the same, whether the trust was created with or without fraudulent intent, because the intent of the person, who created the trust, to commit fraud, could not injure the creditors of his grantee.

DEBTOR AND CREDITOR—EXTENDING CREDIT TO APPARENT OWNER—EFFECT OF.—One who extends credit to the apparent owner of property, relying upon false statements of ownership, acquires no fixed right in such property.

TRUSTS—ENFORCEMENT OF, WHEN FRAUDULENT—OBLIGATION TO RECONVEY.—The fact that a fraudulent grantor cannot enforce a secret trust against his fraudulent grantee proves that he has no legal right, but it does not prove that the grantee ought not to execute such trust.

TRUSTS—FRAUD—RIGHTS OF TRUSTEE'S CREDITORS—SUIT BY BENEFICIARY TO REMOVE CLOUD ON TITLE.—Under facts showing that a person, who was separated from his wife, bought a lot, and, for the purpose of defrauding her of her community rights, had the deed made to another in trust for the buyer; that the purchaser improved the lot by building a house thereon, and occupied the house, exercising every act of ownership; that seven years later the trustee conveyed the property to the cestui que trust in accordance with his promise to do so; that the trustee had, in the mean time, obtained credit on the faith of the deed to himself and of his representations that he owned the property; and that creditors of the trustee, after the last conveyance, levied attachments upon the lot, in a suit against him, and obtained judgments accordingly; it must be held that the deed of reconveyance was made upon a valuable and sufficient consideration; that such creditors acquired no rights in the property, by their judgments, as against the beneficiary; and that the latter is entitled to maintain a suit against them to remove the cloud upon his title.

Suit to remove cloud upon title, brought in a county court by Bicocchi against the Casey-Swasey Company and the Texas Fix-

ture Company, and concerning certain real property belonging to Bicocchi. The liens claimed by the defendants were held valid, and the plaintiff appealed to the court of civil appeals. The judgment denying a recovery was there affirmed and the plaintiff sued out a writ of error.

John W. Wray, for the plaintiff in error.

Ross & Terrell and J. C. Terrell, Jr., for the defendants in error.

²⁶¹ BROWN, A. J. In this case, the court of civil appeals adopted the findings of fact filed by the judge of the trial court, from which we make the following condensed statement of the case:

In October, 1889, L. Bicocchi bought the lot in controversy from R. E. Maddox for the sum of eleven hundred and fifty dollars; one-half was paid in cash at the time by Bicocchi, and for the other half of the purchase money D. Mazza gave his note, which note was afterward paid by plaintiff in error. The deed to the lot was made by Maddox to D. Mazza upon the agreement and understanding between Bicocchi and Mazza that the latter should hold the title for the former until such time as it should be desired by Bicocchi, when Mazza should convey the land to him. Mazza married the sister of the plaintiff in error.

Within a short time after the purchase of the lot Bicocchi caused a house to be built upon it at a cost of three thousand five hundred dollars. For some time he rented out the lower room of the house, collecting the rent therefor himself, and used the upper story of the building for sleeping rooms for himself. During the four years preceding April, 1895, Bicocchi had carried on a business of his own upon the ground floor of this building, and had used and occupied the upper story for himself, and during all the time since he purchased and built upon it he had the actual possession of the property himself, or was holding it by tenant to whom he rented it. The property ²⁶² was insured and assessed for taxes in the name of D. Mazza, but the premium for insurance and the taxes were paid with money furnished by Bicocchi.

At the time that the plaintiff in error bought the lot and had it deeded to Mazza he was a married man and has so continued ever since, but his wife at that time lived in the city of New Orleans in the state of Louisiana, where she has continued to live, and he then and has since resided in the city of Fort Worth,

Texas. They had one child, a daughter, who was with the father in Fort Worth and kept at a boarding-school in that city.

The court of civil appeals finds that the deed was made to Mazza in anticipation of divorce proceedings by the wife, and for the purpose of defrauding her of her interest in the lot or the money invested in it. The title to the lot remained in the name of Mazza until April 3, 1895, when he conveyed it to Bicocchi in compliance with his agreement and without other consideration. During the time that the title remained in the name of Mazza, plaintiff in error borrowed money from a loan company in Fort Worth, for which Mazza gave a mortgage upon the lot to secure the payment of a note given by the latter for the money so borrowed, but the note was paid by Bicocchi himself.

During all the time between the making of the deed to the lot in question in the name of Mazza and the time that he conveyed it to Bicocchi, the former was a grocer and retail liquor dealer in the city of Fort Worth. Casey-Swasey Company was a corporation engaged in the mercantile business in the said city of Fort Worth, and between December 1, 1894, and April 3, 1895, sold to Mazza goods for which the debt sued upon as hereafter stated was contracted. In August, 1894, Mazza made a report of his financial condition to Bradstreet's Agency, which was doing business in the city of Fort Worth, and in that report in writing represented that he was the owner of the property in question, which he valued at four thousand dollars, and in January, 1895, he made a statement of his financial condition to Casey-Swasey Company, in which he represented that he owned the said property and valued it at five thousand seven hundred and twenty-five dollars. The goods which were purchased by Mazza from Casey-Swasey Company were sold by them upon the faith of the representations made by Mazza that he owned the property aforesaid as well as other property.

In 1894, D. Mazza, being indebted to the Texas Fixture Company, a corporation doing business in the city of Fort Worth, for fixtures sold by that company to him, gave his note for the amount of his indebtedness and executed a chattel mortgage to secure the same upon the fixtures so purchased by him, and he requested that company that the mortgage should not be placed upon record, representing that he owned the property in controversy, as well as other property, and was entirely solvent, and, relying upon the representations so made, the Texas Fixture Company did not place the mortgage of record.

On the sixth day of April, 1895, D. Mazza made and deliv-

ered a mortgage on all of his property subject to execution, in which he preferred ²⁶³ certain creditors, among whom was Bicocchi, who was preferred for a debt of three thousand dollars due to him from Mazza, and also a bank of Fort Worth was preferred for a note of two thousand dollars on which Bicocchi was the surety of Mazza. This mortgage did not include the property in controversy, without which the property of D. Mazza was inadequate to pay his debts.

On the eighth day of April, 1895, the Casey-Swasey Company and the Texas Fixture Company instituted suits in the county court of Tarrant county against D. Mazza for the debts due each, and in each suit caused an attachment to be issued and levied upon the property in controversy. Judgment was rendered in each case for the debt and foreclosing the lien of the attachment upon the lot.

Bicocchi, not being a party to the suits above named, instituted this suit, after the judgment had been rendered foreclosing the lien upon the lot, for the purpose of removing the cloud cast upon his title by the said judgments, and, upon a trial in the district court of Tarrant county without a jury, the court gave judgment for the defendants, which judgment was affirmed by the court of civil appeals.

Upon the facts of this case the following legal questions are presented for our determination: 1. Was the conveyance of the property by Mazza to Bicocchi made without consideration? 2. Did the creditors of D. Mazza, the defendants in error, acquire a right in the property in controversy which they could enforce against the land after it was conveyed to Bicocchi?

Article 2544 of the Revised Statutes reads as follows: "Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be, lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives or assigns, be void." Under this statute we do not consider it material to determine whether the wife could be considered a creditor or not; because she, having a community interest in the land, would be embraced in the language, "or other persons of or from what they are or may be lawfully entitled to"; and if it be true that Bicocchi, in causing the deed to be made to Mazza, intended thereby to defraud his wife of her community rights in the property or the money paid

for it, then the conveyance to Mazza would come within the terms of the article above quoted. We shall therefore consider the question as if it were a transaction made and entered into by the parties for the purpose of defrauding the creditors of Bicocchi.

If Bicocchi purchased and paid for the property and caused the same to be deeded to Mazza for the purpose of defrauding his wife, and Mazza accepted it knowing the intention of Bicocchi, the ownership of the property was, not in fact vested in Mazza, but the law, in order to ²⁶⁴ discourage such transactions, would refuse to interfere to aid either party to the fraudulent transaction, and, the legal title being by the deed vested in Mazza, the property could be subjected to his debts by his creditors while it so remained, and he could have transferred the property to any other person. The ground upon which the creditors of a fraudulent grantor can subject the property in the hands of the fraudulent grantee to their debts is, that the title does not pass by the conveyance, but really remains in the grantor himself.

In the case of *Mullanphy Sav. Bank v. Lyle*, 7 Lea, 431, the question of the relative rights of creditors of the fraudulent grantor and fraudulent grantee of the property was ably discussed and decided. In that case one O'Neal had made a fraudulent conveyance of his property to Lyle, and the creditors of the latter had levied attachments upon it, thereby securing a lien upon the property. The plaintiff bank, which was a creditor of O'Neal, intervened in the suit and claimed priority in the distribution of the funds derived from the sale of the property. The court held that the plaintiff, the creditor of O'Neal, was entitled to the preference over the creditors of Lyle. The court said: "It being decided that his pretended purchase was void, O'Neal had parted with nothing by his pretended sale, and the debt due to him stood as though there had been no transfer by him."

Although the courts will not interfere and aid a fraudulent grantor to enforce the promise to reconvey, on grounds of public policy—that is, to discourage such transactions—yet, if the grantee, in compliance with such agreement, has reconveyed the property to the grantor, such reconveyance will be upheld. Courts of equity recognize that there is a moral obligation resting upon the fraudulent grantee to execute the trust which he has undertaken, and, although they will not enforce its execution, they will uphold it when performed. In the case of *Swift v. Holdridge*, 10 Ohio, 231, 36 Am. Dec. 85, that court said:

"An honest man will not take a fraudulent conveyance. If a man holds property fraudulently conveyed, as soon as he comes to a sense of his moral duty, he will restore it to those to whom it belongs; he ought to give it back to him from whom he received it, that it may be applied to his debts, if wanted, or to his benefit, if not necessary for this purpose. The law, to discourage frauds, does not compel him to restore it to the fraudulent grantor; yet no man will retain it for a moment, who desires the reputation of honesty, or possesses the sense of justice": See, also, *Wait on Fraudulent Conveyances*, sec. 398, p. 545.

We conclude that the correct rule, and that which is supported by authority and sound reasoning, is, that when the fraudulent grantee has, in compliance with his verbal agreement, made a reconveyance of the property to the fraudulent grantor, the moral obligation under which he placed himself to make this reconveyance is a valuable and sufficient consideration to support the deed of reconveyance. While the legal title to the property remained in Mazza, his creditors might have subjected it to the payment of their debts, and if they had taken proceedings by ²⁶⁵ which they fixed a lien upon the property before the conveyance was made, their rights would be superior to those of Bicocchi, but, having failed to secure any right in the property itself before the conveyance was made, they cannot now reach it in the hands of Bicocchi, because his right to have the property reconveyed was equally binding as were the rights of the creditors of Mazza to have their debts paid; and Mazza, having conveyed the property in satisfaction of a promise to do so, that conveyance must be held to be good against the debts of the defendants in error: *Clark v. Rucker*, 7 B. Mon. 583; *Powell v. Ivey*, 88 N. C. 256; *Stanton v. Shaw*, 3 Baxt. 12; *Davis v. Graves*, 29 Barb. 480; *Wait on Fraudulent Conveyances*, secs. 387-398; *Bump on Fraudulent Conveyances*, 224; *Petty v. Petty*, 31 N. J. Eq. 14; *Irion v. Mills*, 41 Tex. 310. The following cases bear upon this question, but are not so directly in point: *Hutchins v. Sprague*, 4 N. H. 469; 17 Am. Dec. 439; *Bank v. Brady*, 96 Ind. 498; *Thomas v. Goodwin*, 12 Mass. 140.

The court of civil appeals, in affirming the judgment of the district court, seems to have proceeded upon two grounds: 1. That D. Mazza, having represented that the property in question belonged to him and obtained credit upon the faith of his ownership of it, practiced a fraud upon his creditors when he conveyed the property to Bicocchi and that his deed so made was void under the statute of frauds; 2. That as to the creditors

of Mazza who trusted him on the faith of his ownership of the property, Bicocchi was estopped to deny Mazza's title, by reason of the fact that he permitted the title to remain in Mazza's name for seven years, and that Mazza represented the property to be his. In support of these positions the court cites the following authorities: Chapin v. Pease, 10 Conn. 69; 25 Am. Dec. 56; Budd v. Atkinson, 30 N. J. Eq. 530; Besson v. Eveland, 26 N. J. Eq. 468; Susong v. Williams, 1 Heisk. 625; Roy v. McPherson, 11 Neb. 197; Peck v. Jones, 10 Tex. Civ. App. 335; Wait on Fraudulent Conveyances, sec. 387.

The case of Chapin v. Pease, 10 Conn. 69, 25 Am. Dec. 56, was decided solely upon the ground that the reconveyance was voluntary. In other words, the court held that the fraudulent grantee was under no obligation, legal or moral, to reconvey the property to the fraudulent grantor in accordance with the agreement made, and that such deed was a voluntary conveyance and therefore void as to creditors. This is an assertion of the doctrine directly the opposite of that which we have stated as our conclusion and supported by the authorities cited. If the position that there is no moral obligation upon the fraudulent grantee to reconvey to the grantor be sound, the conclusion is irresistible that the reconveyance would be voluntary and void as to creditors; the fallacy lies in the premise. But the court of civil appeals does not base its opinion upon the ground that the deed was voluntary, but upon the idea that the creditors of Mazza, by his fraud and by estoppel upon Bicocchi, acquired some kind of undefined right in the property. The authorities which we now review seem to have been cited in support of this position.

²⁸⁶ In Budd v. Atkinson, 30 N. J. Eq. 530, the decision of the court is rested upon the conclusion that there is no trust as between the grantor and grantee, but that the title absolutely vested and was intended to vest in the grantee at the time, and therefore the reconveyance from the son to the father was without consideration and void as to creditors. And in the case of Besson v. Eveland, 26 N. J. Eq. 468, the question was as to whether or not the property in controversy had been purchased with the funds of the wife, and was therefore her separate property, and the court held that it devolved upon the wife to establish that fact and that the testimony was not sufficient to prove that the property had been purchased with her separate funds. In each of these cases the chancellor mentions with disapproval the fact that the property had been permitted to remain in the name of the grantee and that thereby he was enabled to procure

credit upon it; but in neither of them is the decision placed upon that ground.

Susong v. Williams, 1 Heisk. 625, involved the validity of a conveyance from a son to his mother, based upon what was claimed to be an agreement to reconvey at the time the mother conveyed to the son. The facts, briefly stated, were, that the parties lived in the state of Tennessee, and during the war Mrs. Williams became alarmed lest her property might be confiscated by the United States government, to prevent which she conveyed the land in question to her son, Joseph A. Williams. At the time this conveyance was made it was stated that after the war should close, if the mother should desire it, or if the other heirs of the deceased father were dissatisfied, Joseph would reconvey the property to her. The son went into possession of the property, and so remained for a number of years, with the title in his name, during which time he contracted the debt for which it was sought to sell it. After contracting the debt, the son reconveyed to the mother. Upon this state of facts the court held that no trust ever existed nor was intended to be created, but that it was intended at the time to vest the title of the property in Joseph A. Williams, "and the subsequent reconveyance under the facts and circumstances of this case must be held to have been made without consideration, and was fraudulent by construction against existing creditors." It is true that in this case the court refers to the fact that the possession of the property had enabled the son to perpetrate fraud upon his creditors, and states that the mother was estopped to deny the title; but that question was not involved in the case, and, in fact, the whole case was disposed of upon the question of its being a voluntary conveyance. That case was decided in 1870, and in 1873 the case of *Stanton v. Shaw*, 3 Baxt. 12, before cited herein, was decided by the supreme court of that state, in which it was held that, where a conveyance was made for the purpose of defrauding the creditors of the grantor, but such creditors entered no proceeding against the fraudulent grantee nor fixed any lien upon it as the property of such grantee before it was reconveyed to the creditor, the creditors of the grantee could not subject such property to their debts in the hands of a ²⁶⁷ fraudulent grantor, to whom it had been reconveyed. If the court in *Susong v. Williams*, 1 Heisk. 625, intended to hold the opposite of this doctrine, then the later case of *Stanton v. Shaw*, 3 Baxt. 12, had the effect to overrule the former.

Roy v. McPherson, 11 Neb. 197, is also cited by the court of

civil appeals, and upon examination of it we find that the creditor of the fraudulent grantee had recovered a judgment and fixed a lien upon the property before it was reconveyed. This necessarily disposed of that case; yet the court does indulge in remarks as to the wife being estopped by reason of the title remaining in the name of the husband for so many years.

Peck v. Jones, 10 Tex. Civ. App. 335, contains some remarks which might be construed to support the proposition laid down by the court of civil appeals in this case, but the question was not involved in that case. Wait on Fraudulent Conveyances, section 387, which is cited by the court, gives what the author considers the point decided in Susong v. Williams, 1 Heisk. 625, and Budd v. Atkinson, 30 N. J. Eq. 530, in which we think he mistook the rhetoric of the judge for the decision of the court. No opinion is expressed indorsing the decisions, but the following adversary proposition is stated: "Where, however, a fraudulent mortgagee reconveys the land to the fraudulent mortgagor before any lien attaches in favor of the creditors of the former, they cannot subject the land to the payment of their debts." Whatever weight is to be given to this work is clearly against the position it has been cited to support: See, also, Wait on Fraudulent Conveyances, sec. 398.

We have examined all of the authorities cited by the court of civil appeals and by the defendant in error, and such others as we can find, but have found no case in which a court has based its decision upon the doctrine that the fraudulent grantor after reconveyance was estopped to deny the rights of creditors of the fraudulent grantee because the title was permitted to remain in the name of the grantee, or because the grantee represented the property to be his own and obtained credit upon faith of his ownership.

The ownership of property carries with it the right of disposition, and an insolvent debtor, so long as he does not act in bad faith, may sell his property, or he may convey it to one creditor in payment of his debt in preference to all other creditors, or he may, in preference to other creditors, give a mortgage upon it to secure such creditors as he may choose, provided that the creditor who is benefited by such preference acts fairly in the matter: Bump on Fraudulent Conveyances, 172, 180; Dance v. Seaman, 11 Gratt. 778; Edwards v. Dickson, 66 Tex. 614. In the case last cited, Judge Gaines, speaking for the court, said: "The right of a creditor to purchase

of a debtor in failing circumstances a sufficient amount of property to pay his debt is well recognized by authority, although the necessary consequence of the transaction is to hinder and delay other creditors in the collection of their debts. This principle follows as a deduction from the right of an insolvent debtor to prefer one creditor to another, ²⁶⁸ and is subject to the qualification, that no more property must be transferred than is essential to pay the debt at a fair valuation, and that the transaction must be open and bona fide; and in saying that the transaction must be made in good faith, we understand it is meant that the sale must be absolute, that is, not attended with any secret trust for the benefit of the debtor, and must be a real and not a mere colorable transaction: See *Greenleve v. Blum*, above cited. If it be a real transfer of the property unaccompanied with any secret understanding or trust on behalf of the debtor, and with intent to satisfy the debt, and no more property be sold than is necessary for that purpose, then it matters not whether or not the debtor intended to hinder or delay his creditors, or whether the creditor knew or ought to have known of such intent, if it existed." In accordance with this doctrine, which is not questioned in any court that we know of, if Mazza conveyed the property to Bicocchi in compliance with his agreement to do so, the conveyance so made must be held good, although Mazza may have had the intent to defraud the defendants in error by making such conveyance, because the moral obligation which Mazza owed to the plaintiff in error to convey the property to him in execution of the trust was equal to his obligation to the defendants to pay their debts: *Irion v. Mills*, 41 Tex. 310; *Frazer v. Thatcher*, 49 Tex. 26; *Parker v. Coop*, 60 Tex. 114; *Inglehart v. Willis*, 58 Tex. 306. The cases of *Irion v. Mills*, 41 Tex. 310, *Frazer v. Thatcher*, 49 Tex. 26, and *Parker v. Coop*, 60 Tex. 114, were cases of trust unaffected by fraud and could have been enforced against the trustee, but when we reach the conclusion that Mazza was under a moral obligation to convey to Bicocchi, and that such moral obligation was a sufficient consideration to support the deed, the conveyance having been made, this case is practically the same as those, for the reason that the only difference which the law makes between the two classes of trusts is that the one can be enforced as between the parties to it and the other cannot; and when that which could not be enforced has been executed, then all distinction is abolished and they stand upon a parity. Such a conveyance could

not be held to be fraudulent. The fraud practiced in creating the debts could not avoid the deed thus made.

We come now to the question, Did the defendants in error acquire any right in this property which the plaintiff in error is estopped to deny after the property was conveyed to him? We must bear in mind the true issue which arises upon the facts of this case. Bicocchi is not denying that Mazza had title to the lot when the debts were contracted, but claims that Mazza's title is now vested in him by the conveyance, free from the claims of defendants in error.

The learned judge who wrote the opinion of the court of civil appeals said: "Mazza would be estopped from disputing the truth of the representation made when the credit was obtained. Does Bicocchi occupy a better position? He is not an innocent purchaser without notice. He had the conveyance made to Mazza originally for a purpose ²⁶⁰ that the law condemns; and whether it does or not, he not only caused Mazza to conceal the real ownership, but actively held him out for seven years as the owner, and certainly placed it within the power of Mazza to deceive appellees as was done. In order that Mazza might securely keep appellant's secret, and hence keep faith with him, he was bound to represent himself as the owner to his creditors and the commercial agency or go out of business, as his business was done on a credit. But if his representations to appellees were not the necessary, they were certainly the natural, consequence of what appellant had undertaken through him to do. That one is presumed to intend the natural consequences of his own acts is a familiar maxim, and we think should have application here." The court in the foregoing extract does not explicitly state but necessarily includes the following propositions: 1. That by reason of the false representations made by Mazza and the reliance placed upon them by the defendants in error, the latter acquired a right to have their debts paid out of this particular property; and 2. That Bicocchi is estopped by his acts to deny the right of the defendants in error to have this property sold for the payment of their debts. The court of civil appeals adopted the conclusions of fact filed by the trial judge, in which we find nothing to sustain the argument contained in the foregoing extract, that "he [Bicocchi] not only caused Mazza to conceal the real ownership, but actively held him out for seven years as the owner." The findings of fact by the trial court show that Bicocchi purchased and paid for the lot and

caused it to be deeded in the name of Mazza, which deed was recorded, after which the plaintiff in error built a house upon it and occupied it all the time, either by himself or a tenant, the greater part of the time using it himself, and when not doing business in the house himself he exercised ownership over it, rented it out, and collected the rent. Every visible act of ownership was exercised by the plaintiff in error. We therefore consider the case upon the facts as found by the trial court and adopted by the court of civil appeals, in determining whether Bicocchi is estopped to deny the right claimed by the defendants in error in this piece of property.

Estoppel, if allowed to be complete, as against Bicocchi, could not confer upon the defendants in error as creditors greater rights than they would have if the representations of Mazza and that which appeared upon the face of the deed were true: *Baylor County v. Craig*, 69 Tex. 330. In the case last cited this court, quoting from *Grissler v. Powers*, 81 N. Y. 57, 37 Am. Rep. 475, said: " 'As a general rule, the estoppel created by false representations acted upon is commensurate with the thing represented, and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented were true.' " This is a reasonable and well-established rule of law, for it certainly could not be contended that a false statement made by Mazza could give to his creditors a greater right in his property than they would have if he had told them the truth. If Bicocchi is estopped to deny the statements ²⁷⁰ made by Mazza as to his ownership of the property, then, considering those statements as true, what rights would the creditor have acquired in that property? For example, let us suppose that Mazza was the real owner of the property, without any trust connected therewith, and made the same statements as to ownership, and that the same creditors, acting upon the faith that he was the real owner, contracted the debts as they did, would they have acquired a lien upon this property? We have never seen such a proposition asserted in any law book, and we presume that no one would claim that such a thing could exist; yet nothing less than a lien in favor of defendants in error will support the judgment in this case. A case in point is where a debtor conveys land to one who is a bona fide purchaser for value, or gives a chattel mortgage upon personal property, the deed or mortgage not being recorded. Under our statutes (Rev. Stats., art. 625, on the subject of conveyances, and Sayles' Rev. Stats., art. 3190 b, governing chattel mortgages) every deed or mortgage which is not recorded is declared to be void as to creditors, but

our courts have uniformly held that the word "creditors" as there used means such creditors as have acquired some right in the property itself, as by mortgage, or by attachment, levy of execution, or some other method of fixing a lien upon it: *Grace v. Wade*, 45 Tex. 522; *Overstreet v. Manning*, 67 Tex. 663. In such case, the creditor is misled by the appearance of the title as much as in this case, but, under the ruling of our court, he acquires no right by reason of the confidence that he placed in the condition of the title, which delusive condition was caused by the failure of the grantee to put his deed upon record.

So far as it affects the creditors of a grantee, the rule with regard to their right must be the same, whether the secret trust be created with or without fraudulent intent, because the intent of the person who creates the trust to commit fraud upon his creditors or some other person can in no wise work an injury to the creditors of his grantee. The fact that the title appears to be in the person to whom the credit is given has the same effect upon his creditors, whether it be coupled with a trust fraudulent or honest. If the rule of estoppel laid down by the court of civil appeals be adopted, then, whenever one holds property under a secret trust for another and shall make false statements as to the real ownership of it, and thereby procures credit upon the belief that his statements are true, the beneficiary in such trust must be held responsible for the false statements so made and for the false appearance of the title as shown by his consent upon the record, and by these facts be estopped to claim the property as against creditors. It has been decided by this court that in such a trust, where there is no fraud, the creditor of a grantee in whom the title appears to be acquires no lien, even by a judgment rendered against his debtor before conveyance is made to the beneficiary, such trusts not being affected by the statute on the subject of registration: *Irion v. Mills*, 41 Tex. 310; *Parker v. Coop*, 60 Tex. 111.

²⁷¹ The estoppel applied in this case goes beyond the limits of the rules of law, and the further proposition that one who extends credit to the apparent owner of property, relying upon false statements of ownership, acquires a fixed right in such property would lead to many complications and produce more injustice than that which has aroused the indignation and enlisted the sympathies of judges in the cases cited, leading them to expressions which are more elegant than accurate. We will give some illustrations of what we regard as probable consequences of that rule. Let us suppose that before Mazza conveyed to Bicocchi,

a creditor of the former, who did not know of the existence of the property in question and did not rely upon it in giving credit, had levied an attachment upon it. Such attachment, levied before the conveyance was made, would have held the property as against Bicocchi. If the defendants in error, holding the same debts, contracted upon the same representations by Mazza and under the same belief as to the truth of those representations, had subsequently to the first attachment, but also before the conveyance to Bicocchi, levied a writ of attachment upon the same property, claiming priority over the first attaching creditors, because their debt was contracted upon their faith in the statements of Mazza, and with reference to his ownership of this particular property, could they have maintained their claim of priority over the prior attaching creditors? We think clearly they could not. If both attachments had been levied in the same order after the conveyance was made to Bicocchi, the first attaching creditor's right would be superior to the second attachment, but would be inferior to the right of the grantee; and yet, according to the holding of the court of civil appeals in this case, the second attachment, which could not hold the property as against the first attachment, would be declared to have a right of foreclosure against Bicocchi, whose right would be superior to that of the first attaching creditor. These inconsistencies and complications show that the proposition upon which this judgment rests is at variance with the well-settled rules of law by which alone courts may determine upon the rights of citizens.

Judicially looked at from any standpoint, this case finally resolves itself into the question first stated, Was Mazza under moral obligation to convey to Bicocchi the property in accordance with his agreement, and did that moral obligation constitute such a consideration as would in law be sufficient to sustain a deed of conveyance when made in pursuance of such agreement? Having reached an affirmative answer to that question, the case must be determined in favor of the validity of the conveyance made by Mazza to the plaintiff in error.

The strongest objection urged to such a conclusion is that the fraudulent grantor could not enforce the trust, which proves that he had not a legal right, but does not prove that he who has undertaken the trust ought not in good conscience and good morals to execute that trust. It is well known to courts that the moral sentiment of all communities holds a fraudulent grantee, who takes advantage of the law to repudiate ²⁷² his trust

and appropriate the trust fund, to be unworthy of confidence, and courts, as we have shown, conform to this sentiment in holding that such grantee is under moral obligation to keep faith with one who has trusted him. Many illustrations might be made of this doctrine of the law, but we will content ourselves with one, which we think is sufficient. Suppose that Mazza had owned this property free from a trust and had contracted his debts in the same manner that he did, upon the same character of representations, which were true, and that among other creditors he was indebted to Bicocchi in a sum equal to the value of the property; but that the debt was barred by limitation. No one would deny that Mazza would be under a moral obligation to pay the debt, and if he had conveyed this property under such circumstances to Bicocchi in discharge of the debt barred by limitation and in consideration of his moral obligation to pay that which could not legally be enforced against him, the conveyance would certainly be a good and valid conveyance against the defendants in error.

It is well settled by the authorities that if a fraudulent grantee has paid out the trust fund to creditors of his grantor who might have received such fund from the grantor in payment of their debts, this will discharge the grantee from further liability to other creditors of the grantor, because by paying the fund to the creditors he has done what the law would compel him to do and what the debtor might have done himself: *Hutchins v. Sprague*, 4 N. H. 469; 17 Am. Dec. 439; *Thomas v. Goodwin*, 12 Mass. 140. The effect of the deed to Mazza was to defraud Mrs. Bicocchi of her community interest in the property, and she might have maintained a suit to declare the trust and enforce it, which would have the effect to vest the title in the community. The conveyance from Mazza to Bicocchi vested the property in the community estate of Bicocchi and his wife and accomplishes all that a suit in equity would have accomplished. It annuls the fraudulent act of the parties and does justice to the wife. To deny this effect to the deed of Mazza, in which he conveyed the property to Bicocchi, would perpetuate the fraud against the wife, whose rights were superior to any claim that the creditors of Mazza might have in the property, they not having secured any lien thereon.

We have not found it necessary in this case to determine whether the continued possession of Bicocchi was sufficient to put the creditors of Mazza upon inquiry as to the real state of the title and thereby charge them with notice, but we think it

proper to remark in conclusion that the fact of Bicocchi holding the actual and continuous open possession of the property from the time of its purchase was at least sufficient to meet any claim of the creditors that they were misled by any act of his save that which resulted in placing the title in the name of Mazza.

Upon the facts as found by the trial court and adopted by the court of civil appeals, judgment should have been rendered for Bicocchi. It is therefore ordered that the judgments of the district court and the court of civil appeals be reversed and that judgment be here entered in favor of the plaintiff in error, L. Bicocchi, against the defendants in ²⁷³ error, setting aside and annulling any lien which the judgments rendered in favor of the defendants in error against Mazza might appear to have upon the property in question, and removing all clouds from the title to said property cast upon the same by the rendition of the said judgments, the levy of the attachments, or the foreclosure of the liens thereof, and that the plaintiff in error recover of the defendants in error all costs in the several courts.

TRUSTS—CREDITORS OF TRUSTEE—RIGHTS OF.—Persons who deal with trustees and extend them credit do not, as a rule, acquire any lien on, or right to proceed against, the trust estate in their hands: See monographic note to *Johnson v. Leman*, 19 Am. St. Rep. 67, on liens against trust estates in favor of creditors or trustees.

SECRET TRUST—CONVEYANCE BY HUSBAND TO DEFRAUD HIS WIFE.—That a transfer of property made by a husband to defraud his wife is void, see *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642, and note, showing that, if a grantor conveys property for a meager consideration, under an agreement to reconvey, the deed and agreement create a secret trust in favor of the grantor, and are fraudulent as against the grantor's wife in her suit for divorce and alimony when the grantee had notice at the time of the facts constituting the ground for divorce.

FRAUDULENT CONVEYANCES—RECONVEYANCE—RIGHTS OF CREDITORS.—While a fraudulent grantee is under no legal, but only a moral, obligation to reconvey to his grantor, yet when he makes a reconveyance, such act will be binding on him, and if the rights of no innocent third party have intervened, the fraudulent grantor will become reinvested, both in law and in equity, with the title previously conveyed to his grantee: *Springfield Homestead Assn. v. Roll*, 137 Ill. 205; 31 Am. St. Rep. 358. If such reconveyance is voluntary, and made while the grantee is in failing circumstances, it is void as to his creditors: *Chapin v. Pease*, 10 Conn. 69; 25 Am. Dec. 56; and a grantee, under a fraudulent conveyance, cannot acquire a title by possession, however long continued, against the grantor's creditors: *Beach v. Catlin*, 4 Day, 284; 4 Am. Dec. 221.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. BEALL.

[91 TEXAS, 810.]

DAMAGES—NEGLIGENCE—WRONGFUL EMPLOYMENT AND DEATH OF MINOR.—There can be no recovery by parents for the wrongful employment of their minor son in a dangerous service, without their consent, and his consequent death, if such death was instantaneous.

DAMAGES—NEGLIGENCE—WRONGFUL EMPLOYMENT AND DEATH OF MINOR—CONTRIBUTORY NEGLIGENCE—STATUTE.—As a father's right to recover for the wrongful employment of his minor son, in a dangerous service, without his consent, and his consequent death, depends upon the statute, which imputes the contributory negligence of the deceased son to the father, it is error, where the death was instantaneous, to give instructions authorizing a recovery, whether the deceased was, or was not, guilty of contributory negligence.

J. W. Terry and Charles K. Lee, for the appellant.

A. M. Monteith, for the appellee.

§11 DENMAN, A. J. In this cause the court of civil appeals have certified to this court the following questions and explanatory statement:

"This is a suit by W. T. Beall and wife against the appellant to recover damages resulting from the death of their minor son, W. C. Beall. W. C. Beall was instantaneously killed by being run over by one of the cars of appellant's road. At the time he was killed, he was acting as a brakeman in the employ of the appellant, and was a minor, about nineteen years of age. He was on top of the car that was being switched, and, by reason of some movement or jar or jerk of the car, he fell from the top of the car to the track below, and was run over, crushed, and killed. Plaintiffs brought this suit to recover damages resulting from the death of their minor son, alleging that he was a minor at the time, and that that fact was known to the appellant, and that he was employed by the appellant without their consent, and that the business of brakeman, in which he was engaged, was dangerous. There is evidence which tends to establish these facts. The jury found that he was a minor when so employed, and was wrongfully employed by the defendant, and assessed the damages at fifteen hundred dollars.

"There is an assignment of error, in which appellant complains of the following charge: 'If you find that the son was a minor, and employed without the consent or acquiescence of the father in a dangerous employment, and that defendant's

servants knew he was a minor, or ought to have known it, from his youthful appearance, then plaintiffs would be entitled to recover, whether the son was guilty of contributory negligence or not, or whether the engine and appliance were sound and suitable for the business or not, or whether said employes were skilled and competent or not. The wrong, if any, consists under such supposed state of facts, if you find them proved, in the unauthorized employment of a minor, if you find from the testimony that there was such unauthorized employment of plaintiff's minor son.'

"In this connection it is well to say that there is some evidence in the record which tends to show that the deceased was guilty of negligence of such a character that may have contributed to his injuries, and of such force as would have authorized the court below to have submitted to the jury the issue of contributory negligence. It further appears from the record that the jury, in making up their verdict, considered the value of the services of the deceased minor son.

"Now, in view of this statement, the court of civil appeals for the third supreme judicial district certifies to the supreme court of Texas the following questions: 1. The deceased being instantaneously killed, could the parents, at common law, recover for the value of the services of the minor child after his death? 2. Was it error, in view of the instantaneous death of the minor, and under the facts as stated, for the court to give the charge quoted?"

In *Baker v. Bolton*, 1 Camp. 493, decided in 1808, Lord Ellenborough said that "in a civil court the death of a human being could not be complained of as an injury." In adhering to the broad principle thus announced, Pigott, B., in *Osborn v. Gillett* (1873), L. R. 8 Ex. 88, which was a suit brought by the father to recover for the loss of services of his daughter whose death had been occasioned by the negligence of defendant's servant, said: "By the third plea the defendant says that she was killed on the spot, and the first question is, whether this plea affords a good defense in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that when the service is simply interrupted by accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause no action can be sustained. Still, I am of opinion that the law has been so understood up to the present time; and if it is to be changed it rests

with the legislature and not with the courts to make the change.

"It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding had been to the effect laid down by Lord Ellenborough, in 1808, in *Baker v. Bolton*, 1 Camp. 493.

This rule has been generally followed by the American courts, though some vigorous protests have been made against it, and none of the various reasons assigned therefor seem entirely satisfactory. No useful purpose would be subserved by an attempt to add anything to what has been said in the well-considered opinions cited and commented upon by Mr. Tiffany in his work entitled "*Death by Wrongful Act*," sections 1 to 18, where an interesting and exhaustive discussion of the question will be found. After a careful examination, we are of opinion that, though the reason for the original adoption of the rule announced by Lord Ellenborough is involved in doubt and obscurity, still the rule itself is a well-established principle of the "common law of England" adopted in this state by act approved January 20, 1840; and we feel bound thereby.

We therefore answer the first question certified in the negative, and, since the father's right to recover depends upon the statute which imputes to him the deceased son's contributory negligence, the second question certified must be answered in the affirmative.

DAMAGES — NEGLIGENCE — INSTANTANEOUS DEATH — STATUTE.—Under a statute providing that actions for personal injury shall "survive," the fact that death was instantaneous has been held fatal to the maintenance of an action for an injury to a relative causing death, on the ground that, unless there is some interval between the injury and the death, the deceased could not have had a cause of action, although a very brief interval would suffice: See monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 635, on actions for injuries to relatives.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY v. GORMLEY.

[91 TEXAS, 393.]

RAILROADS—EMPLOYEES—NEGLIGENCE—DEGREE OF CARE—ERRONEOUS INSTRUCTION.—In an action against a railroad company to recover damages for an injury to an employé, alleged to have been caused by the company's negligence, it is error to instruct the jury that "the degree of care of all parties is higher

when the lives and limbs of themselves or others are endangered than in ordinary cases."

RAILROADS—EMPLOYEES—NEGLIGENCE—DEGREE OF CARE—QUANTUM OF DILIGENCE.—The law imposes upon a railway company the exercise of ordinary care to provide for each and all employes, machinery, roadbed, and appliances reasonably safe, and to exercise like care to maintain them in that condition; but the degree of care does not vary with the increase or diminution of danger. It continues to be ordinary in degree, though the quantum of diligence to be used differs under different conditions.

RAILROADS — EMPLOYEES — NEGLIGENCE—ORDINARY CARE—ERRONEOUS INSTRUCTION.—To define "ordinary care," in an action against a railroad company for negligently injuring an employe, as that degree of care which may reasonably be expected of one in the situation of the person injured, is erroneous, so far as it applies to the care required of the company.

NEGLIGENCE—DEGREE OF CARE—HOW FIXED.—The degree of care is fixed by the relations of the parties, as master and servant or carrier and passenger, but the quantum of vigilance to be exercised must be determined by the circumstances; more care must be used whenever there is greater danger.

RAILROADS — EMPLOYEES AND STRUCTURES — ORDINARY CARE—NEGLIGENCE—ERRONEOUS INSTRUCTION.—In an action against a railroad company for negligently injuring one of its employes, it is error to instruct the jury that it is the duty of the company "to do everything that can reasonably be done" for the safety of its employes, and to have the structures along its line "to be reasonably safe." The law does not require a railroad company, as a duty to employes, "to have the structures to be reasonably safe," but simply requires that it should exercise ordinary care to have them in that condition.

RAILROADS—NEGLIGENCE—STRUCTURES AND APPLIANCES—ORDINARY CARE.—A railroad company is required to use ordinary care to furnish structures and appliances which are reasonably safe, and to use such care to maintain them in that condition.

RAILROADS — RULES — KNOWLEDGE—PROOF—ERRONEOUS INSTRUCTION.—If a railroad company has rules and regulations for its employes, it is not necessary, in an action against the company for fatal injuries to an employe, that the evidence should show that he had knowledge of such rules, but, in the absence of proof to the contrary, he will be presumed to have known them. Hence, an instruction requiring the company not only to prove that the deceased employe knew such rules, but to prove that it was insisting upon and enforcing them, is error, for if the plaintiff relies upon the abrogation of the rule by its nonenforcement, he must prove it.

INSTRUCTIONS—REFUSAL OF NOT ERROR, WHEN.—There is no error in refusing to give instructions which have already been submitted to the jury.

WITNESSES — OBJECTION TO WHOLE ANSWER IS PROPERLY OVERRULED, WHEN.—Though part only of a witness' answer is objectionable, it is not error to overrule an objection to the whole answer, if the objector does not separate the admissible part from the inadmissible, as he should do. The court is not required to do it.

Action brought by Lillie Gormley and others against the defendant railway company to recover damages for the death of

D. J. Gormley, an employé of the defendant, which death was alleged to have been caused by the negligence of the company. A judgment for the plaintiffs was affirmed on appeal to the court of civil appeals, and the defendant sued out a writ of error.

McNeal, Harwood & Walsh, and A. L. Jackson, for the plaintiff in error.

A. B. Davidson and Atkinson & Abernethy, for the defendants in error.

⁸⁹⁶ BROWN, A. J. This suit was instituted by Lillie Gormley—now Burnett—in her own right and as next friend of her infant son, D. J. Gormley, and by Thomas and Ann Gormley, to recover of the railroad company damages for the death of David Gormley, who was the husband of Lillie and the father of the minor, D. J. Gormley, and was the son of Thomas and Ann Gormley. During the pendency of the suit, Lillie Gormley intermarried with V. D. Burnett, who joins her in this action. The court of civil appeals files the following conclusions of fact:

“On the twenty-seventh day of August, 1892, the appellee Lillie Burnett was the wife of D. J. Gormley; the appellee David J. Gormley is his son, and Thomas and Ann Gormley are deceased’s parents. On the date above mentioned, D. J. Gormley was in the employ of appellant company in the capacity of a brakeman on one of its freight trains, which was then being run over its road; that on the night of the day stated D. J. Gormley was sitting on top of one of the cars of said moving train in the performance of the duty of his employment, and that while so riding upon said car in his place of duty, he was, without any fault or negligence on his part proximately contributing to the accident, struck by a spout attached to one of appellant’s water tanks, which spout the appellant negligently allowed to be and remain out of repair and to overhang its railroad track and car upon which Gormley was sitting, and the force of the blow from said spout knocked him off the car, and he was run over by the cars attached to said train, and thereby so injured that he died on the following day. That by reason of his death, which was proximately caused by said negligence of appellant, his wife Lillie was damaged in the sum of two thousand five hundred dollars, and his son David J. in the sum of four thousand dollars.”

Upon a trial before a jury, verdict was returned and judgment

rendered for the plaintiff for six thousand five hundred dollars, which was apportioned as follows: Two thousand five hundred dollars to Lillie Burnett and four thousand dollars to the son of D. J. Gormley; which judgment was affirmed by the court of civil appeals.

³⁹⁰ In its application for this writ of error the railroad company sets up a number of grounds that we do not think it necessary to give special attention to, because they are either immaterial or not well taken. We will consider such of the grounds presented in the petition for writ of error as we deem to be material and necessary to be examined with a view to another trial.

The judge of the trial court charged the jury as follows:

"4. Negligence, in a general sense, is any omission to perform a duty imposed by law for the protection of one's own person or property or the person or property of another.

"5. Negligence, to some extent, should be measured by the character, risk, and exposure of the business engaged in, and the degree of care of all parties is higher when the lives and limbs of themselves or others are endangered than in ordinary cases."

"7. By ordinary care is meant that degree of care which may reasonably be expected of a person in the situation of the person alleged to have been injured, at the time the injury was inflicted."

The fourth and fifth paragraphs of the court's charge to the jury announce abstract principles of law which furnished no guide to the jury in deciding upon the issue of negligence. That portion of the fifth paragraph which informed the jury that "the degree of care of all parties is higher when the lives and limbs of themselves or others are endangered than in ordinary cases" is not correct as applied to this case. According to that statement, the degree of care required of the defendant toward the deceased would be higher, if his life and limbs were endangered in the service, than toward another employé who was not to exercise like care to maintain them in that condition. The degree of care does not vary with the increase or diminution of danger; it continues to be ordinary in degree, but the quantum of diligence to be used differs under different conditions: *Gulf etc. Ry. v. Smith*, 87 Tex. 348. For example, we will suppose that in the construction of defendant's railroad it built a culvert over a small ravine, the foundation and timbers of which were comparatively light, and that it also constructed a bridge over a river, putting in piers with heavy foundations deeply

laid in the earth, and using iron for the superstructure instead of wood. In each instance, the degree of care required as to employés, was ordinary, but the amount of care to be exercised in the construction of the bridge was much greater than in building the small culvert, because there would be greater danger in its use, and a man of ordinary prudence would use more diligence to provide against injury.

The seventh paragraph gives the only definition of ordinary care that is to be found in the charge of the court. If intended to apply to the defendant, it was erroneous in making the conduct to be expected of the deceased the standard, leaving each juror to determine what might be ⁴⁰⁰ reasonably expected of the injured party. The care which the defendant was bound to exercise toward deceased could not be determined by what the latter would be expected to do. The degrees of care to be used by both might be the same, but not necessarily so. If the deceased had been a passenger the care exacted of him would have been ordinary, while the law would have imposed upon defendant the highest degree. The degree of care is fixed by the relations of the parties as master and servant or carrier and passenger, but the quantum of vigilance to be exercised must be determined by the circumstances; more care must be used whenever there is greater danger.

The tenth paragraph in the court's charge is in part as follows: "It is a duty imposed by law upon the railway companies to do everything that can be reasonably done for the safety of their employés, and to have the structures erected along and by their lines of road for use in connection with the running and operating of their trains along such lines of road to be reasonably safe; and a failure to do so will render a corporation liable for any damage resulting to such employés." This charge imposed upon the railroad company a degree of diligence which is not required of it except as a carrier of passengers. To "do everything that can be reasonably done" is all that could be expected of very prudent persons, and constitutes the highest degree of care that the law imposes upon railroad companies. The law does not require the railroad company, as a duty to employés, "to have the structures to be reasonably safe," but requires that it should exercise ordinary care to keep them in that condition. It may be that the judge who drew this charge intended that it should read "and do everything that can reasonably be done to have the structures," et cetera. If, however,

we read it in that way, it is still subject to the objection that it imposes a greater burden upon the railroad company than is required by law. The railroad company was required by law to use such care as a person of ordinary prudence would have used, under like circumstances, to furnish structures and appliances which were reasonably safe, and to use such care to maintain them in that condition.

In the thirteenth paragraph of the charge given by the court to the jury, it is in substance stated that it is lawful for a railroad company to make reasonable rules and regulations for the government of its employés in the discharge of their duties, and that an employé who willfully or negligently disobeys such rules or regulations, and is thereby injured, cannot hold the railroad company liable for such injury; and the charge continues in the following language: "But in order to find for the defendant company on this issue, you must find from a preponderance of the evidence that the defendant company was exacting the observance of such rules by its employés, and that said Gormley knew of the existence of said rules and of their enforced observance by the defendant at the time he was injured, and that, at the time of his injury, he was violating said rules, and that the act done by him in violation of said rule was the proximate and not the mediate cause of his ⁴⁰¹ death." We think there was error in the latter part of the charge above quoted, but that it was immaterial and would not require a reversal of the judgment in this case, because it does not appear from the evidence that the injury which was received by Gormley resulted from a violation of the rule introduced in evidence. But we have thought proper to comment upon this charge and point out its error in view of another trial.

When the proof shows that the railroad company has made and promulgated rules and regulations for the government of its employés, it is not necessary that the evidence should show that the employé claiming to have been injured had knowledge of the existence of such rule, but, in the absence of proof to the contrary, he will be presumed to know of the rules and regulations established by the company: *Pilkinton v. Gulf etc. Ry.*, 70 Tex. 230; *Missouri Pac. Ry. Co. v. Watts*, 63 Tex. 552; *Missouri Pac. Ry. Co. v. Callbreath*, 66 Tex. 528. This charge not only required of the defendant to prove that the deceased knew of the rule, but also to prove that the defendant was insisting upon and enforcing the observance of the rule by its employés. If the plaintiffs relied upon the abrogation of the

rule by its nonenforcement, it devolved upon them to establish that fact.

The first special charge asked by the defendant, which was given by the court, contains every material proposition applicable to this case that is embraced in the seventh special charge requested by the defendant, which was refused by the court, and which is here complained of as error. There was no error in the court refusing to give in charge that which had already been submitted to the jury.

The trial court did not err in overruling the objection to the testimony of Robinson, as shown in bill of exception No. 4, because a part of it was admissible and the objection was to the whole. The court was not required to separate the admissible from what was inadmissible; the objector should do that. If the evidence did not show that the agent to whom notice was given had such connection with the tank as to make it his duty to give notice of its condition or to repair it, that part of the evidence should have been excluded on proper objection or motion.

The district court erred in the fifth, seventh, and tenth paragraphs of the charge given to the jury, for which errors the judgments of said district court and of the court of civil appeals are reversed and this cause is remanded.

RAILROADS—CARE REQUIRED OF, AS TO MACHINERY, STRUCTURES, ETC.—A railroad company does not warrant to its servants the safe condition of its line and machinery; it guarantees only that due care shall be used in constructing, keeping in repair, and operating its line, appliances, and machinery: *Little Rock etc. Ry. Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245. An employer is bound only to reasonable care in providing machinery and appliances in view of all the circumstances: See note to *Greenlee v. Southern Ry. Co.*, 65 Am. St. Rep. 740.

NEGLIGENCE.—ORDINARY CARE is that degree of care which people of ordinarily prudent habits could be reasonably expected to exercise under the circumstances of a given case: *Driscoll v. Market St. Ry. Co.*, 97 Cal. 553; 33 Am. St. Rep. 203, and note. Negligence is a relative term, and, in its application, depends on the situation of the parties, and the degree of care and vigilance which the circumstances usually impose: *Hays v. Gainesville St. Ry. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Kelly v. Michigan Cent. R. R. Co.*, 65 Mich. 186; 8 Am. St. Rep. 876.

INSTRUCTIONS NEED NOT BE REPEATED, and it is not error to refuse such as have already been given: *Burdiet v. Missouri Pac. Ry. Co.*, 123 Mo. 221; 45 Am. St. Rep. 528.

BRITISH-AMERICA ASSURANCE COMPANY v. MILLER.

[91 TEXAS, 414.]

INSURANCE—CONSTRUCTION OF CONTRACT.—When a contract of insurance is unambiguous in its terms, it will be enforced, for courts will not so construe plain language as to make a contract embrace that which it was intended not to include.

INSURANCE—LIABILITY FOR LOSS WHERE LOCATION OF PROPERTY IS CHANGED.—If personal property is insured “while contained in” a certain house, “and not elsewhere,” and a loss thereof occurs at another place, the company is not answerable for it, although the insurer knew, when the policy was issued, that the insured, a judge, was in the habit, while holding court in neighboring counties, of taking such property along with him, for use in other places by his family, which accompanied him.

William Thompson, for the appellant.

Carrigan & Montgomery and Theodore Mack, for the appellee.

417 BROWN, A. J. The court of civil appeals for the second supreme judicial district has certified to this court the following statement and question:

“We deem it advisable, both parties consenting, to certify to your honors for decision the controlling, if not the sole, question in this case, which briefly is, whether, upon the agreed statement below, the terms of the fire insurance policy declared on by appellee covered the loss sustained by him during the life of the policy in a fire at Henrietta, Texas, which not only destroyed the residence of one Fraser, where appellee and his family were temporarily boarding during a term of the district court then being held by appellee, who was the then regular judge of said court, and which was known to appellant at the time of the issuance of the policy, but also eight hundred and forty dollars’ worth of ‘trunks, . . . satchels, . . . family wearing apparel, . . . watches, jewels, and jewelry in use,’ belonging to appellee and then in ordinary use by himself and family, the policy having been issued to him in Wichita Falls, Texas, the place of his residence, covering all loss or damage by fire to his dwelling-house there situated, as described in the policy, which policy in the printed part contained these words: ‘While located and contained as described herein, and not elsewhere’; and the printed slip attached to said policy by the agent and describing the property insured expressly mentioned ‘trunks, satchels, . . . family wearing apparel, . . . watches, . . . jewels and jewelry in use,’ et cetera, ‘all while contained in the above-described

building,' and at the bottom of said slip is written and printed: "This form is attached to and constitutes the written and descriptive portion of Policy No. 922657 of the British-America Assurance Company of Toronto.' "

The following is a condensed statement of the facts material for the decision of the question certified to us:

Appellee George E. Miller was, on the twenty-sixth day of January, 1896, and still is, judge of the thirtieth judicial district of the state of Texas, which embraces the counties of Wichita, Clay, Archer, and Young. Judge Miller resided at Wichita Falls, in Wichita county, and owned a residence in that city, located as described in the policy of insurance sued on; and in which residence he resided with his family, which consisted of a wife and two children, respectively six and three years old. In the discharge of his official duties Judge Miller held ⁴¹⁸ court twice in each year in the counties above named, at which times he carried his family with him; which facts were known to the agents of the appellant at the time that the policy of insurance sued upon was issued, but the agents did not know the length of time that the family remained with him at each term of the court.

Anderson, Moore, and Bean were empowered to make contracts for the appellant, the British-America Assurance Company, insuring property situated in Wichita Falls against loss from fire, but were not authorized to insure property situated elsewhere.

On the 26th of January, 1896, Anderson, Moore, and Bean, as agents for the British-America Assurance Company, made and delivered to George E. Miller a policy of insurance, from which we make the following extracts:

"British-America Assurance Company, Toronto, Canada.

"In consideration of the stipulations herein named and of twenty-eight and 50-100 dollars premium does insure Hon. Geo. E. Miller for the term of one year, from the twenty-sixth day of January, 1896, at noon, to the twenty-sixth day of January, 1897, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding two thousand and ninety and no-100 dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

"\$850 on his Household and Kitchen Furniture, useful and ornamental, Beds, Bedding, Linen, Carpets, Plate and Plated Ware, China, Glass and Crockery Ware, Trunks, Satchels, Sew-

ing Machines, Family Wearing Apparel Fuel and Family Supplies; also on Musical Instruments, Printed Books and Music, Mirrors, Pictures, Paintings, Engravings, and their frames, Statuary, Bric-a-brac, Watches, Jewels and Jewelry in use, in case of loss none to be valued at exceeding cost; all while contained in the above-described building."

On the seventh day of October, 1896, Judge Miller was holding a regular term of the district court at Henrietta, in Clay county, and had with him his wife and children. They were boarding at the house of J. A. Fraser, at which place Judge Miller and his wife had with them for the use of themselves and their children the property which was burned by fire and which was a part of the personal property described in the policy of insurance in the clause above quoted, and consisted of wearing apparel, jewelry, satchels, trunks, books, et cetera, which property was usually contained in the residence of Judge Miller at Wichita Falls when he and his family were at home. At 2:30 P. M. on the said day, a fire occurred at the house of Fraser by which the wearing apparel, jewelry, et cetera, belonging to Judge Miller was damaged and destroyed to the value of eight hundred and forty dollars.

There is no dispute of the claim of Judge Miller upon any ground except that which is embraced in the question agreed upon by the parties, which is as follows: "The issue to be determined under the above facts is, whether or not defendant is liable to plaintiff under the policy. The ⁴¹⁹ loss having occurred in Henrietta, Texas, defendant claims that its policy under the facts limits its liability to losses which may occur to the property while the same is located and contained in the residence described in the policy. Plaintiff claims that the policy covers the loss at Henrietta under the facts above recited."

To the question propounded we answer that the property which was destroyed by fire at the city of Henrietta was not covered by the policy of insurance described in the statement submitted with the question, and the insurance company was not liable for such loss.

While it is true that courts will construe the language of an insurance policy, and especially a clause of forfeiture contained therein, most strongly against the insurer and in such manner as to protect the insured, if the language used is susceptible of such construction, it is likewise true that when a party dealing with an insurance company has made a contract which is unambiguous in its terms, courts will construe and enforce it in

the same way as if made between natural persons. A number of cases have been cited which construe the language "contained in" as being descriptive of the place at which the property is located at the time the insurance is obtained, and others in which courts have held that such language must be construed with reference to the use of the property insured; that is, if its ordinary use causes it to be absent from such place, and if, being so absent from the place mentioned, it is destroyed by fire, the property is nevertheless protected by the policy, and the insurance companies have been held to be liable therefor: *McCluer v. Girard etc. Ins. Co.*, 43 Iowa, 349; 22 Am. Rep. 249; *American Cent. Ins. Co. v. Hawes* (Penn., Oct. 13, 1887), 11 Atl. Rep. 107; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400.

But in the cases above referred to the terms of the policies were less definite than is the one now before the court. In the policy under consideration, the property is insured "while located and contained as described herein and not elsewhere"; and in connection with the clause which describes the property which was destroyed by fire this language is used: "All while contained in the above-described building"—showing that the property was not insured while out of the house. It is claimed by the appellee that this case comes within the rule laid down in *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 47 Am. St. Rep. 121, and that the language used must be construed with reference to the ordinary use of the property insured. In the case of *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 47 Am. St. Rep. 121, the language under construction—a clause of forfeiture—did not in its terms embrace some of the articles that were afterward destroyed, which were embraced in the contract part of the policy, and, in discussing the effect of the forfeiture clause, this court said: "If the conditions or warranties be repugnant to the portions of the policy describing the subject of insurance, the condition must yield to that portion which expresses the terms of liability, as if, for instance, the body of the policy grants insurance upon a stock such as is usually carried in a country store or such as is usually carried in a retail store, and the conditions prescribing that the carrying in the stock certain articles named as ⁴²⁰ extrahazardous will cause a forfeiture of the policy, and it appears from the evidence that the articles expressly named are usually carried in such stocks and embraced in the terms of a policy describing the subject, the clause of forfeiture must yield to the language of the body of the policy, and the forfeiture will not be forced." This simply states the rule that

when there is a conflict the contracting part of the policy will prevail over clauses of forfeiture. In other words, the court will not hold that the insurance company did not intend to insure that which it expressly contracted to insure; on the other hand, courts will not so construe plain language as to make a contract embrace that which it was intended not to include.

It is insisted by the appellee that in the ordinary use of wearing apparel, jewelry, trunks, satchels, and the like they would at times be absent from the residence of the owner, and that the agent of the insurance companies knew that the assured was in the habit of taking his family with him to the different places where he held terms of the district court in his district, and must have known that such things are generally used on such occasions; therefore the policy must be construed with reference to such general and known uses by the assured, and that the case comes within the line of authorities cited by the appellee to the effect that property thus used will be protected when absent from the house by a policy in which it is described as being "contained" in a certain house. However, in this policy the insurance company so definitely and unequivocally expresses a contract by which it is not bound for the loss of the property when absent from the named place that there is no room for construction. The protection afforded by the policy is expressly limited to the time that the subject of insurance shall be contained in the house described and whenever it was taken therefrom it was removed beyond the protection of the contract: *Green v. Liverpool etc. Ins. Co.*, 91 Iowa, 615; *Mawhinney v. Southern Ins. Co.*, 98 Cal. 184; *Haws v. St. Paul etc. Ins. Co.* (Penn. 1888) 15 Atl. Rep. 915. The policy was not forfeited by the removal, but remained in force and covered the property when returned to the residence in Wichita Falls—hence the rule that demands a construction which would prevent a forfeiture has no application. The insurance company, knowing that the class of property embraced in the policy was liable to be removed to other places, provided against liability for it when located at such other points by the express and plain limitations. The appellee likewise knew that in the ordinary use of the property embraced in the contract of insurance it would be carried to other places than his residence in Wichita Falls, whereby it would be voluntarily withdrawn from the protection afforded by the contract of insurance, and, if he desired to have it protected while using it away from home, he could

have made a contract expressing such liability on the part of the insurance company.

FIRE INSURANCE—CONSTRUCTION OF POLICY.—Courts cannot go outside of a contract of insurance to determine the mutual or reciprocal obligations of the parties: *Dover Glass etc. Co. v. American Fire Ins. Co.*, 1 Marv. (Del.) 32; 65 Am. St. Rep. 264. If erty "contained in" a certain place is insured against fire, it has been held that there can be no recovery if it is burned elsewhere: *Farmers' Mut. Fire Assn. v. Kryder*, 5 Ind. App. 430; 51 Am. St. Rep. 284, and note, showing other views.

WESTERN UNION TELEGRAPH COMPANY v. MITCHELL.

[91 TEXAS, 454.]

TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—DAMAGES—PLEADING.—If a telegram sent to an absent owner of a cattle ranch, by one in charge thereof, notifying him of the lowness of water on the place, is delayed, and such owner sues the telegraph company, alleging that its negligent failure to deliver the message prevented him from repairing to his ranch and making arrangements for water for his cattle, in consequence of which he suffered damages specially set out, his complaint is subject to special demurrer, if it does not allege when, where, and in what manner he could have arranged to get water for his cattle and thereby avoid the injuries complained of.

TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—DAMAGES—EVIDENCE.—What a party would do under a given state of facts which call upon him to perform a duty to some other person is a fact which can be testified to by such party. Hence, if a telegraph company fails to perform a duty which it owes to the addressee of a message in not delivering it to some other person for him, he is entitled to show that, if the duty had been performed, such person would have transmitted the message to him, thereby averting the injury, if any, caused by such breach of duty.

TELEGRAPH COMPANIES—ABSENT ADDRESSEE OF MESSAGE—DUTY OF DELIVERY TO HIS WIFE.—It is the duty of a telegraph company to deliver a message to the addressee, though he is away from his home or place of business, if he can, by reasonable efforts of the company, be found; but whether ordinary diligence has been used is a question of fact for the jury, and it is error to instruct them that it is, as a matter of law, the duty of the company, in such a case, to deliver the message to the addressee's wife, at their home, for a wife as such, is not, in law, the general agent of her husband.

John A. Green, Sr., Hutchison & Franklin, and John A. Green, Jr., for the appellant.

L. H. Browne and Brown & Pritchett, for the appellee.

456 BROWN, A. J. The court of civil appeals for the third supreme judicial district has certified for our consideration the questions hereinafter stated, which are accompanied by a state-

ment from which we make the following substantial statement of the facts necessary to the consideration of the questions submitted.

W. F. Mitchell filed a suit in the district court of Hays county against the Western Union Telegraph Company, alleging in substance that on the twenty-fourth day of March, 1890, the plaintiff resided in San Marcos, Texas, and owned a cattle ranch in Presidio county, Texas; on which he had ten thousand head of cattle; that plaintiff at that time was in San Marcos, but the ranch and the cattle were under the control and management of his son, F. A. Mitchell, who was then on the ranch and in the active management of the same. It is alleged that the supply of water on the said ranch was amply sufficient for the support of the cattle held on it, up to the twenty-third day of March, 1890, when the supply of water was suddenly greatly diminished, so that on the 24th of that month the cattle were in great danger of famishing for water unless speedily relieved, which F. A. Mitchell was not able to do, in the absence of the plaintiff, nor could anyone else procure water for the said cattle, because it required that special negotiations should be made on behalf of the plaintiff with third parties, which negotiations neither F. A. Mitchell nor any other person could effect. That if plaintiff had been present he could have made such arrangements in time to have saved his cattle from the damages which they afterward sustained.

The petition alleged that on the twenty-fourth day of March, 1890, F. A. Mitchell, as agent for the plaintiff, caused to be delivered to the agent of the defendant at the town of Marfa, Texas, the following message:

"Marfa, Texas, 3-24-90.

"To W. F. Mitchell, San Marcos.

"Water is getting low. Come out.

(Signed) "F. A. MITCHELL."

It is averred that at the time this message was delivered to the defendant's agent, the latter was informed of the dangerous situation of the cattle, that they were upon the ranch, and the supply of water had become insufficient, and the cattle were in present danger of starving for water, and of the necessity for the presence of the plaintiff to provide water; also that the message was being sent to the plaintiff that he might come with all possible speed to make necessary arrangements for water. That plaintiff was ignorant of the failure of the water and of

the dangerous situation of his cattle, and remained absent from the ranch three days longer than he would if he had received the message in due time. It is alleged that if the message had been delivered in a reasonable time the plaintiff would have gone to his ranch at once, and could and would have made arrangements for water for his cattle which would have prevented the losses that occurred thereafter. It was not ⁴⁵⁷ averred that he could have made any particular arrangements with any particular person in order to have procured the water, nor what kind of arrangements could have been made. The petition charged that the defendant negligently failed to deliver the message to the plaintiff, whereby he was prevented from repairing to his ranch and making arrangements for water for his cattle, and in consequence of which he suffered damages which were particularly set out.

The defendant filed special exceptions to the petition, "because it is not alleged therein when, where, and in what manner he could have arranged to get water for his cattle and thereby avoid the injuries complained of." The trial court overruled the exception, to which the defendant excepted, and the ruling is assigned for error.

Plaintiff was in San Marcos at his residence on March 24, 1890, until about 10:50 A. M., when he went to the depot and took passage on a southbound passenger train on the International & Great Northern Railroad for Pearsall, which is situated on that road about fifty miles south of San Antonio, and reached Pearsall at about 2 P. M. of the same day, where he remained at a public hotel until 11 A. M. the next day. Mrs. Mary Mitchell, wife of the plaintiff, remained at home in San Marcos, a large two-story house in the thickly settled portion of that town. Defendant's agent at San Marcos was not acquainted with Mitchell at that time, but became acquainted with him a few days afterward.

The evidence for the plaintiff tended to show that on the afternoon of March 24th the agent of defendant at San Marcos telegraphed to the agent of defendant at Marfa that the addressee of the message could not be found in San Marcos, and that the agent at Marfa made inquiry of Gillette, who delivered the message to him, and was by Gillette instructed to have the message delivered to Johnson & Johnson, a firm of merchants in San Marcos.

Upon the trial of the case, the attorneys for the plaintiff asked G. G. Johnson, a member of the firm of Johnson & Johnson,

and Mrs. Mary Mitchell, each separately, in substance the following question: What he or she could and would have done if the message had been delivered to him or to her on the evening of the 24th of March? To which question, each witness answered in substance that he or she, as the case might be, would have sent it to the plaintiff at Pearsall. To which questions and answers the defendant objected, "because it invades the province of the jury, is problematical, and is merely an opinion." The objections were overruled and exceptions saved.

The court charged the jury as follows: "If you find from the evidence in this case that on the twenty-fourth day of March, 1890, the defendant, at Marfa, Texas, received and accepted for transmission and delivery the telegraph message described in plaintiff's petition, and that when the message arrived at San Marcos W. F. Mitchell was absent from his place of residence, but that his wife was at his place of residence, then you are further instructed that a delivery of it to her, at his place of residence, in his absence, would have been, in contemplation of law, a delivery of it to him."

The court of civil appeals submitted to this court the following questions: "1. Did the trial court err in overruling the special exception to the plaintiff's petition, as set out above? 2. Did said court err in overruling the objections interposed to the testimony, as set out above? 3. Is the special charge above quoted subject to any of the objections urged against it, as set out above, and did the trial court commit error in giving said charge?"

The trial court erred in overruling the special exception to the plaintiff's petition mentioned in the first question submitted. The particular arrangement which the plaintiff could have made to secure water for his cattle if he had received the telegram in time is a fact and not the evidence of a fact. It is a material fact in this case, without proof of which no recovery can be had.

The object of pleading is to notify the opposite party of the facts which the pleader expects to prove, and the allegation of such facts must be made with that certainty which will enable the adverse party to prepare his evidence to meet the alleged facts. Whatever falls short of doing this is not good pleading and is subject to demurrer: *Ransome v. Bearden*, 50 Tex. 128. In the case cited this court said: "In the case before us, the plaintiff's pleadings nowhere stated what facts came to her knowledge leading her to the discovery that the will was forged. The

allegations were not such as to enable the defendant to anticipate the facts on which plaintiff relied, and he could not prepare to rebut or disprove them. The construction which we have given the statute will require the application to this case of the rule of pleading laid down in *Bremond v. McLean*, 45 Tex. 19, and would lead to the conclusion that plaintiff's petition was defective."

In *Bremond v. McLean*, 45 Tex. 19, the plaintiff, in order to avoid the bar of the statute of limitations, alleged that he could not, by due diligence, have discovered the fraud which he alleged to have been practiced upon him. To this general allegation the defendant excepted specially, which was overruled, and this court said: "The mere statements in the petition that the plaintiff could not have discovered that the alleged representations of defendant were false and fraudulent by the use of reasonable diligence, evidently will not relieve him from the bar of the statute. If the want of such knowledge will prevent the running of the statute it is not sufficient for the plaintiff to assert merely the conclusion that he could not have discerned that the representations made him were false by the use of reasonable diligence, but he must state the facts upon which he relies, that the court may see whether they justify and support such a conclusion. The exception to the petition on this ground was well taken and should have been sustained."

The allegation in the plaintiff's petition that he could have made arrangements ⁴⁵⁹ by which to secure water for the relief of his cattle is but a conclusion drawn from the particular facts of the case, and, if he had attempted to prove by any witness the conclusion as alleged, it would have been objectionable, upon the ground that it was a statement of a conclusion and not of a fact.

There was no error in the action of the trial court in overruling the objections presented to the evidence of Johnson and Mrs. Mitchell. What a party would do under a given state of facts which call upon him or her to perform a duty to some other person is not a matter of opinion merely, but a fact which can be testified to by such person, and, if the defendant failed to perform a duty which it owed to the plaintiff in not delivering the message to either witness, the plaintiff was entitled to show that, if the duty had been performed by such delivery, the person to whom it would have thus been delivered would have transmitted it to him, and thereby the injury could have been averted.

There was error in giving the special charge mentioned in the

third question. The general rule is expressed by Croswell in his work on the law of Electricity, section 412, thus: "The leading principle as to delivery of a telegram is, that the message is to be delivered to the person to whom it is addressed, and the place of address is subordinate to the person; and, therefore, if the person cannot be found at the street and number or other place to which the telegram is addressed, but can be found by reasonable efforts of the telegraph company in some other place, it may be negligence for the company to leave the telegram at the place of address without making further efforts to find the absent person and make personal delivery": *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *Western Union Tel. Co. v. Houghton*, 82 Tex. 561; 27 Am. St. Rep. 918; *Telegraph Co. v. Newhouse*, 6 Ind. App. 422; *Pope v. Telegraph Co.*, 9 Mo. App. 283.

If a message be addressed to the care of another, it may be delivered to such person; or if the addressee has taken rooms at a hotel, where it is the custom to deliver mail and such messages, it will be presumed that the clerk is the agent of the guest to receive messages of this character, and a delivery to such clerk will be sufficient.

The wife, as such, is not in law the general agent of her husband, and we know of no principle of law that would justify the conclusion that it was the duty of the defendant to deliver the message in this case to Mrs. Mitchell, nor that such a delivery to her would have satisfied the obligation of the telegraph company to Mitchell.

The duty which the telegraph company owes to the addressee is personal, and cannot be discharged by making inquiry for the person to whose care the message may be sent, nor by applying to the place of business or residence of the addressee, but inquiry must be made for the person addressed, if the circumstances are such as to show that he may probably be found away from such place of business or residence. The place to which a message is sent is but a guide for the messenger, and does not determine the measure of his diligence. Whether the ⁴⁰⁰ messenger who is charged with the delivery of a telegram and fails to present it at the residence or place of business of the addressee has used ordinary diligence such as the law requires is a question of fact for the jury; and it was error for the court in effect to charge the jury as a matter of law that it was a duty of the telegraph company to deliver the message to the plaintiff's wife.

Attorneys for appellee cite the case of *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119, as supporting the charge of the court above referred to; and upon a careful investigation we have found *Western Union Tel. Co. v. Woods*, 56 Kan. 737, which we think is more nearly in point. The former case was based upon substantially the following facts: A message was sent to the plaintiff, and the telegraph company inquired at his place of business, ascertaining that he had left the city, and having exhausted all means of delivering the message to him personally, delivered it to his wife and notified the sender of the fact of such delivery. The court held that the telegraph company had used due care and had discharged its duty to the plaintiff, but did not hold that it was the duty of the company to make the delivery to the wife.

In the case of *Western Union Tel. Co. v. Woods*, 56 Kan. 737, a message was sent to the plaintiff in the case at the town of his residence. He was a merchant, and his store was a short distance from the telegraph office, where his wife was in charge of the business, and he had a clerk employed also. His residence was also near by. The party addressed was out of the town, and the telegraph company failed to apply at his place of business or residence for information or for the purpose of delivering his message. The court held as follows: "Being unable to make a personal delivery at that place, it was the duty of the company to deliver it to his wife or to his clerk at the store or to members of his family at his residence. If delivery had been made at either of these places, the agents of Woods would have had time and opportunity to have sent a message to him at Grant Summit, and thus have averted the loss which followed." It will be observed that the court here speaks of the persons to whom the delivery should have been made as the agents of the party addressed, and in so far as they were agents and authorized to receive the message this is a correct expression of the law, but that portion which announces that it was the duty of the telegraph company to deliver to members of the family is purely dictum and without any support whatever.

Denman, A. J., did not sit.

TELEGRAPH COMPANIES—DUTY OF, AS TO DELIVERY OF MESSAGES—DELIVERY TO WIFE OF ADDRESSEE.—It is the duty of a telegraph company to deliver messages promptly: Note to *Western Union Tel. Co. v. Moore*, 54 Am. St. Rep. 521; and it must use reasonable diligence to find the person to whom a telegram is addressed, for the purpose of delivering it to him. It is

not enough to attempt a delivery only at the office or place of business of the person addressed. If the company, after exercising due diligence, fails to find the addressee, a delivery to the latter's wife with information to the sender, is sufficient: See monographic note to *Western Union Tel. Co. v. Houghton*, 27 Am. St. Rep. 923, 925, on the duty of telegraph corporations to find the person addressed.

SANGER v. WARREN.

[91 TEXAS, 472.]

AGENCY—UNDISCLOSED PRINCIPAL—CONVEYANCE OF LAND.—The rule that an undisclosed principal when subsequently discovered may be held liable upon a contract made with his agent, who, at the time, was supposed to be acting for himself, does not apply to a conveyance of real estate, whether the instrument is sealed or not.

STATUTES—DISPENSING WITH SEAL—EFFECT OF, UPON DEED.—A statute which renders it unnecessary to place a seal upon a deed merely dispenses with a formality, and does not undertake to give one executed without a seal a different status from what it would have had before if executed with a seal. A deed without a seal retains the incidents it possessed as a sealed instrument at common law.

AGENCY—UNDISCLOSED PRINCIPAL—CONVEYANCE OF LAND.—If one conveys land, retaining a vendor's lien thereon, and the purchaser conveys it to a third person, who buys for others, and assumes the payment of purchase money notes given to the original vendor, such other persons are not answerable as the undisclosed principals of the second vendee, upon his contract assuming the payment of the notes for the rule governing the liability of an undisclosed principal does not apply to such a contract.

Coke v. Coke, for the plaintiff in error.

Field, Brown & Camp, John Bookhout, and Holloway & Holloway, for the defendants in error.

478 DENMAN, A. J. On the twelfth day of August, 1887, Mrs. Martha A. Camp, who subsequently married Warren, conveyed by deed certain lands situated in Dallas county to O. P. Bowser, W. H. Lemmon, Oliver Thomas, J. D. Thomas, and W. O. Thomas, in consideration of forty-one thousand five hundred and eighty-nine dollars and eighty cents, five thousand dollars of which was paid in cash and the balance evidenced by seven promissory notes, referred to in the deed executed by said grantees, payable to the order of said grantor, said notes reserving vendor's lien upon the property and stating on their face that they should not be transferred, it being unimportant to state their respective amounts and dates of maturity.

479 On the fifteenth day of March, 1888, said grantees, Bowser et al., by deed duly executed, conveyed said property to Lu-

ther Rees in consideration of the sum of sixty-five thousand dollars, of which seventeen thousand four hundred and eighty-six dollars was paid in cash, and for the balance Rees in said deed assumed to pay off and fully discharge the last six of the seven promissory notes referred to in said deed from Mrs. Camp to Bowser et al., and for the balance of said consideration, which was the sum of fifteen thousand dollars, he executed to said Bowser et al. his promissory notes, a further description of which is unnecessary, a vendor's lien being reserved in said deed to secure the payment of said notes. Rees purchased the land for the benefit of Sanger, Exall, Blankenship, and Henderson, and they furnished the money to make the cash payment, but these facts were not known either to Mrs. Camp or Bowser and others until some time afterward.

Rees subsequently conveyed the land, and said Sanger and others received the considerations for conveyances made by him, the nature of such considerations not being material to state.

This suit was brought by Mrs. M. A. Warren, formerly M. A. Camp, joined by her husband, J. F. Warren, against said grantees Bowser and others, said grantee Luther Rees, said Sanger and others, and one James Wathen, who acquired some of the property under mesne conveyances under Rees, to recover upon certain of said promissory notes, and to foreclose the vendor's lien upon certain portions of said property.

The trial court rendered judgment in favor of Mrs. Warren for the sum of thirty-seven thousand seven hundred and ninety-one dollars and fifty cents, against all said defendants except Rees and Wathen, and foreclosed the lien on the property against all of the defendants, and ordered a sale of same in satisfaction of the judgment, and ordered execution over for any balance against O. P. Bowser, Oliver Thomas, J. D. Thomas, Alexander Sanger, Henry Exall, B. Blankenship, and J. E. Henderson, and further rendered judgment in favor of O. P. Bowser, Oliver Thomas, and J. D. Thomas against said Sanger, Exall, Henderson, and Blankenship for any moneys they might be compelled to pay on the judgment.

From this judgment O. P. Bowser, Oliver Thomas, and J. D. Thomas and Alexander Sanger appealed to the court of civil appeals, which court affirmed the judgment of the trial court, except in so far as it affected O. P. Bowser, Oliver Thomas, and J. D. Thomas, as to whom it reversed and remanded the cause; from which judgment of affirmance against him Alexander Sanger has brought the cause to this court upon writ of error.

We deem it unnecessary to undertake to state the numerous issues presented by the pleadings of the various parties or the facts shown by the voluminous record bearing upon same any further than they bear upon the liability of Alexander Sanger upon said notes, he being the only party complaining here of the judgment.

The first count in the petition sought to hold Sanger, Blankenship, Exall, and Henderson liable upon said notes by alleging that said deed executed by Bowser and others on the fifteenth day of March, 1888, conveyed ⁴⁸⁰ the property to said Sanger and others, they assuming therein as part of the consideration to pay said notes, and that said grantees, for the purpose of concealing their purchase so that plaintiffs would not know who the actual purchasers were, used the name of Luther Rees with his consent to represent their own, and while said Rees appears in the deed as the grantee, yet his name was used to represent and intended to represent Sanger, Exall, Blankenship, and Henderson.

The second count sought to charge them with liability upon the notes upon the ground that Rees, in buying the land, was the agent of Sanger, Exall, Blankenship, and Henderson, and that in purchasing same and assuming the payment of said notes he did not act for himself, but for and on behalf of Sanger and others who were his undisclosed principals and that such course was taken for the fraudulent purpose of concealing from plaintiffs the liability of Sanger and others upon said assumption, and that upon acquiring information of the fact that they were undisclosed principals, plaintiffs accepted their assumption and demanded payment of the notes of them.

The third count seeks to charge them upon the ground that in the purchase of the property Sanger and others were partners under the firm name of Luther Rees, that name being used for the fraudulent purpose of concealing their liability upon the assumption of said notes contained in said deed.

The trial court, presumably upon the ground that there was no evidence to sustain the first and third counts, appears to have submitted the cause to the jury upon the second count only, giving a charge which, as far as it affects Sanger, is as follows:

"And if, from the evidence before you, you find and believe that when Luther Rees purchased the land for which these notes were executed from Bowser and Lemmon and Thomas Brothers, he was acting for the defendants Exall, Sanger, Blankenship, and Henderson, and you further find and believe that these last

four defendants acted together in having Rees purchase the land, and that they paid an equal amount of the cash consideration therefor and were equally interested in the probable profits of the purchase, then in law they would be liable to the plaintiffs to the same extent that the original makers of the notes are, and in this event your verdict should be against said four defendants also for the full amount due on the notes.

"If from the evidence you find and believe that the defendants Sanger, Exall, Blankenship, and Henderson were not interested in the land purchased by Rees from Bowser and Lemmon and Thomas Brothers, and that in purchasing the same Rees was not acting for them, your verdict should be in favor of said four defendants.

"If you find the defendants Sanger, Exall, Blankenship, and Henderson liable in this case, then as between them and defendants Bowser and Lemmon and Thomas Brothers, the relation of principal and surety would exist, and in this event you should find in favor of Bowser and ⁴⁸¹ Thomas Brothers over against the other four defendants for the amount found in favor of plaintiffs.

Before the plaintiff can hold the defendants Sanger, Exall, Blankenship, and Henderson liable in this case they must show, by a fair preponderance of the evidence, that they were equally interested in the land purchased by Rees from Bowser and Lemmon and Thomas Brothers, and that the same was purchased for them, and that they assented to said purchase and complied with its terms, and if the plaintiffs have failed to show this, then they are not liable."

The effect of this charge is to instruct the jury that though on the face of the deed the land was conveyed to Rees and he assumed to pay the notes, still if he, in making the purchase, was in fact the agent of Sanger, Exall, Blankenship, and Henderson, they are liable thereon as undisclosed principals.

Sanger by proper assignments questions the correctness of this charge. It has long been settled to be a general rule of law that if A contracts with B supposing him to be acting in his own behalf, but afterward discovers that he was acting for C, A can thereupon elect to hold C upon the contract. The rule is held applicable to written contracts, and, by a process of reasoning not entirely satisfactory, even to those required by statute to be in writing. In the leading case of *Higgins v. Senior* (1841), 8 Mees. & W. 844, Parke, B., said: "The question in this case, which was argued before us in the course of the last term, may

be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of ten pounds, it is competent for the defendant to discharge himself, on an issue on the plea of non assumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed. Upon consideration, we think it was not; and that the rule for a new trial must be discharged. There is no doubt that, where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such would be to allow parol evidence to contradict the written agreement, which cannot ⁴⁸² be done": *Beckham v. Drake*, 9 Mees. & W. 79; *Texas etc. Co. v. Carroll*, 63 Tex. 48; *Heffron v. Pollard*, 73 Tex. 96; 15 Am. St. Rep. 764.

The exceptions to the rule, however, are so numerous, broad, and well defined, and rest upon principles of such a fundamental character that the careful student of the law is driven to the conclusion that they are more important than the rule itself, and that the statement of the rule in such broad language has produced much confusion of thought and greatly embarrassed and probably has often misled the courts in their efforts to apply correct legal principles to particular cases.

It is well settled that the rule never had any application to negotiable instruments, no one being chargeable thereon "unless his name appears as a party to the paper in some relation": Authorities above cited.

Again, it has been said that "this broad doctrine, that when an agent makes a contract in his own name only, the known or unknown principal may sue or be sued thereon, may be applied in many cases with safety, and especially in cases of informal

commercial contracts. But it is certain that it cannot be applied where exclusive credit is given to the agent, and it is intended by both parties that no resort shall be had by or against the principal (Story on Agency, sec. 160 a), nor does it apply to those cases where skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient in it: Fry on Specific Performance, sec. 149"; Kelly v. Thuey, 102 Mo. 529. And the court refused to allow the undisclosed principal to enforce specific performance of a contract to convey land on the ground that the owner having contracted for the notes of the agent for deferred purchase money he could not be compelled to accept those of the principal.

Again, it is well settled that the rule never had any application to sealed instruments, especially those which at common law must have been under seal, such as conveyances of land: Briggs v. Partridge, 64 N. Y. 357; 21 Am. Rep. 617; Tuthill v. Wilson, 90 N. Y. 423; Walters v. Northern Coal Co., 5 De Gex, M. & G. 629; Borchering v. Katz, 37 N. J. Eq. 150; Farrar v. Lee, 10 N. Y. App. Div. 130, 41 N. Y. Supp. 672; Evans v. Wells, 22 Wend. 335; Jones v. Morris, 61 Ala. 518.

According to the weight of authority, if the deed from Bowser and others to Rees had been sealed and delivered by the grantors to Rees at common law, his acceptance thereof would have made it his deed to the same extent that it would have been if signed and sealed by him also, and that as to him it would have been a sealed instrument. Therefore, an action of covenant could have been maintained against him but not against his principals Sanders and others on the contract of assumption therein contained: Finley v. Simpson, 22 N. J. L. 311; 53 Am. Dec. 252, and authorities cited in briefs therein; Golden v. Knapp, 41 N. J. L. 215; Sparkman v. Gove, 44 N. J. L. 253; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; 13 Am. Rep. 556; Bowen v. Beck, 94 N. Y. 86; 46 Am. Rep. 124; Maynard v. Moore, 76 N. C. 165; Smith v. Pocklington, 1 Cromp. & J. 445; Vanmeter v. Vanmeter, 3 Gratt. 148, and authorities supra. There are cases holding that it would not at common law have been considered Rees' deed and that ⁴⁸³ covenant could not have been maintained thereon against him: Maule v. Weaver, 7 Pa. St. 329; Johnsons v. Muzzy, 45 Vt. 419; 12 Am. Rep. 214; Trustees v. Spencer, 7 Ohio, pt. 2, 149 (493); Goodwin v. Gilbert, 9 Mass. 510; Martin v. Drinan, 128 Mass. 515; Hinsdale v. Humphrey, 15 Conn. 431.

Therefore at common law the general rule above stated would

have had no application to the conveyance to Rees, and his undisclosed principals would not have been liable. We are of opinion that the result is not affected by the following statute: "No private seal or scroll shall be necessary to the validity of any contract, bond, or conveyance, whether respecting real or personal property, or any other instrument of writing, whether official, judicial or private, except such as are made by corporations, nor shall the addition or omission of a seal or scroll in any way affect the force and effect of the same": Rev. Stats., art. 4862. It is true the statute renders it unnecessary to place a seal upon a deed, but it does not undertake to give one executed without a seal a different status from what it would have had before if executed with a seal. On the contrary, it provides that the addition or omission of a seal shall not "in any way affect the force and effect of the same." In order for the omission of the seal not to in any way effect its force or effect, the deed must be allowed to retain the only status it had before. When we adopted the common law, its settled rules relating to the construction and effect of deeds became a part of our system. To them we were compelled to resort to determine the nature and extent of the estate conveyed by the deed as well as of the covenants therein contained, and who were bound or benefited thereby. It was not the intention of said statute to abolish them. As said in *Jones v. Morris*, 61 Ala. 524, in discussing a more comprehensive statute than ours, "though a seal may not now be necessary to a conveyance of a legal estate in lands, yet the instrument, the deed of conveyance, which it must still be termed, though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law. Its covenants may be as comprehensive, and, whatever they may be, are as obligatory, and its recitals are as incapable of being gainsaid, as if it were sealed with the greatest formality. The estoppel which a sealed instrument, or its covenants, created at common law is now claimed by the appellee shall be attached to the conveyance by the agents of the appellant. And we cannot doubt that the estoppel which at common law grew out of the covenants or the recitals of a sealed instrument attaches now to an unsealed conveyance of the legal estate in lands. The statute is not so broad in its sweep as to blot out the common-law principles which give security to conveyances of real estate. It would be fearful, indeed, if this was the operation of the statute, and the freehold in lands was not invested with greater dignity than the fleeting ownership of chattels." *Devlin on Deeds*, sec-

tion 249, says: "The effect of these statutes is simply to dispense with the necessity of affixing a seal to a deed; but in other respects, as for instance with reference to the doctrine of estoppel, the deed retains the incidents it possessed as a sealed instrument at common ⁴⁸⁴ law." The effect of the statute is different as to other contracts, for the placing of the seal thereon at common law raised them from parol to specialty contracts which cannot be done under the statute.

It follows that we are of opinion that the court erred in giving said charge. Our confidence in the correctness of the conclusion we have reached is strengthened by the fact that neither we nor counsel have been able to find any precedent for holding Sanger liable as an undisclosed principal.

The judgments will be reversed and the cause remanded.

AGENCY—LIABILITY OF UNDISCLOSED PRINCIPAL—CONVEYANCE OF LAND—SEAL.—A contract, under seal, made by an agent in his own name for the purchase of land cannot be enforced as the simple contract of the real principal when he shall be discovered: *Briggs v. Partridge*, 64 N. Y. 357; 21 Am. Rep. 617; but a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity: *Briggs v. Partridge*, 64 N. Y. 357; 21 Am. Rep. 617, and numerous cases therein cited. In some of the states real estate may be conveyed by an instrument without a seal: *Pierson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440.

WHEELOCK v. CAVITT.

[91 TEXAS, 679.]

ACKNOWLEDGMENT—MARRIED WOMAN'S DEED—FALSE CERTIFICATE—EFFECT OF—NOTICE OF GRANTEE.—Although a deed which purports to convey the separate property of a married woman has attached to it a notary's certificate, as prescribed by statute, and regular in form, such deed does not divest her of title, or estop her from recovering the land from the grantee therein named, where she alleges and proves that the certificate is false; that, as a matter of fact, she did not appear before the officer who made the certificate; and that he did not take her acknowledgment or attempt to do so; and she may do this without alleging and proving that the grantee had notice of, or participated in, the fraud.

ACKNOWLEDGMENT—MARRIED WOMAN'S DEED—APPEARANCE FOR PURPOSE OF ACKNOWLEDGMENT—EFFECT OF.—If a married woman who has, with her husband, signed a deed conveying her separate real estate, appears before an officer, authorized by law, for the purpose of acknowledging the con-

veyance, and the officer makes a certificate showing compliance with the law, such certificate, though the officer failed to do his duty in taking the acknowledgment, is conclusive upon the married woman, in favor of an innocent purchaser, who paid value for the property, without notice of the officer's dereliction of duty.

ACKNOWLEDGMENT—MARRIED WOMAN'S DEED—NONAPPEARANCE FOR PURPOSE OF ACKNOWLEDGMENT—EFFECT OF.—Although a married woman, with her husband, signed a deed conveying her separate real estate, the certificate of a notary that her acknowledgment thereof was taken in the manner prescribed by statute, however formal, is not binding upon her, even in favor of an innocent purchaser, and for value without notice, where it is shown that she never invoked the notary's authority respecting an acknowledgment of the execution of the deed; that she never appeared before him for the purpose of such acknowledgment; and that no acknowledgment was, in fact, ever made.

W. O. Campbell and C. W. Kinnard, for the appellant.

Simmons & Crawford, for the appellee.

681 **BROWN, A. J.** The court of civil appeals for the third supreme judicial district has certified the questions copied below accompanied by a statement of which the following is the substance:

Appellant sued appellee in the district court of Robertson county to recover a certain tract of land situated in that county and described in the petition, and in addition to the usual allegations contained in a petition in trespass to try title, it was alleged that on the thirteenth day of December, 1872, the plaintiff was a married woman and owned the land sued for in her own separate right in fee simple, and that she still continued to be the owner of the same. She alleged that she continued under coverture until the sixteenth day of August, 1896, when her husband died. The petition alleged that the defendant had taken and was then holding possession of the land, claiming to own it under a deed purporting to have been executed by her and her husband on the thirteenth day of December, 1892, and purporting to have been duly acknowledged by her in the form required for acknowledgments of married women for the sale of their separate property. A copy of the certificate of acknowledgment was set out in the petition and was regular and in every respect in due form and appeared to have been made before a notary public of Robertson county. The plaintiff's petition explicitly alleged that she did not appear before a notary public for the purpose of acknowledging the deed or for any purpose, and that she did not acknowledge the said deed before the said notary public in any manner or at

any time. The allegations meet every phase in which the acknowledgment could be claimed to have been made by her, and negative the fact that such acknowledgment had ever been made, or that she had ever under any circumstances appeared before or been before the notary public for any such purpose, or for any purpose whatever connected with the execution or acknowledgment of the said deed.

The defendant filed exceptions to the petition upon several specified grounds, which embody the following propositions: that the petition does not allege that the defendant either participated in the wrongful acts done by the notary public or had any knowledge or notice of the same. ⁶⁸² The judge of the district court sustained the exceptions, from which judgment appeal was taken to the court of civil appeals.

"With this explanation, the court of civil appeals for the third supreme judicial district, acting by and through its chief justice, certifies to the supreme court for decision the following questions, which are material to a decision in this cause:

"1. When a deed, purporting to convey real estate, the separate property of a married woman, is regular in form and has attached to it a certificate of an officer authorized to take acknowledgments of married women, which certificate is regular in form, and shows on its face that the acknowledgments of the husband and wife were taken in the manner prescribed by statute, will such deed divest the married woman of her title, or estop her from recovering the land from the grantee therein named, if she alleges and proves that the certificate is false, and that as a matter of fact she did not appear before the officer who made the certificate, and he did not take her acknowledgment or attempt to do so?

"2. Will the right of the married woman to avoid such a deed, if the facts be as recited in the first question, depend upon whether or not the grantee in the deed had knowledge or notice of the fact that she did not appear before the officer making the certificate of acknowledgment, and that such certificate was false?

"3. If the question of notice, as submitted in the second question, is material, in an action to recover the land brought by a married woman, would the burden be upon her to allege that the defendant had notice of the defect in the deed at the time he bought the land, or would it be upon him to plead such want of notice as a matter of defense?"

Under the facts alleged in the plaintiff's petition as shown in the statement accompanying the question, the certificate of the officer showing that the plaintiff had acknowledged the deed in question was void, and notwithstanding the vendee may have paid value for the land without notice that the certificate was in fact false, no title passed by the conveyance.

In this state, the rule is firmly established that where a married woman, who has with her husband signed a deed conveying her separate real estate, appears before an officer authorized by law for the purpose of acknowledging the conveyance, and the officer fails to do his duty in taking such acknowledgment, but makes a certificate which shows a full compliance with the law, such certificate is conclusive upon the married woman in favor of an innocent vendee, who paid value for it without notice that the officer failed to perform his duty as required by law: *Pool v. Chase*, 46 Tex. 210; *Kocourek v. Marak*, 54 Tex. 205; 38 Am. Rep. 623; *Waltee v. Weaver*, 57 Tex. 571. The foregoing cases are in harmony with the weight of authority upon this question.

But where it is shown that the married woman has not appeared before the officer for the purpose of acknowledging the execution of the deed, and no acknowledgment has been in fact made, she having in no way invoked the exercise of the officer's authority in that respect, the ⁶⁸³ certificate, however formal, is not binding upon her, even in favor of an innocent purchaser and for value without notice: 1 *Devlin on Deeds*, sec. 532 a; *Breitling v. Chester*, 88 Tex. 589; *Pickins v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 636; *Cheney v. Nathan*, 110 Ala. 254; 55 Am. St. Rep. 26; *Grider v. American etc. Mtg. Co.*, 99 Ala. 281; 42 Am. St. Rep. 58; *Le Mesnager v. Hamilton*, 101 Cal. 532; 40 Am. St. Rep. 81; *Michener v. Cavender*, 38 Pa. St. 334; 80 Am. Dec. 486; *Borland v. Walrath*, 33 Iowa, 130; *Donahue v. Mills*, 41 Ark. 421; *Williamson v. Carskadden*, 36 Ohio St. 664; *Meyer v. Gossett*, 38 Ark. 377; *Allen v. Lenoir*, 53 Miss. 321; *Johnston v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Mays v. Hedges*, 79 Ind. 288.

In *Breitling v. Chester*, 88 Tex. 589, the evidence showed that Mrs. Breitling, in the lifetime of her husband, joined him in making a deed, which purported to convey lands, her separate property, but the certificate of her acknowledgment was defective. She sued to recover the lands after her husband died, and her deposition was taken by the opposite party, in the course of which she stated to the officer that she signed the deed in question; whereupon that officer attached to the deed a certificate in

due form showing that Mrs. Breitling had acknowledged the execution of the deed before him. She offered to prove that she did not intend to acknowledge the deed, but the evidence was excluded, which ruling was before this court. In passing upon that question, Chief Justice Gaines said: "It is clear that a casual admission in the presence of a notary or other duly authorized officer by a person who has signed a conveyance that he had executed the deed does not empower the officer to certify that he has acknowledged it. In order to call into exercise the authority of the officer to make the certificate, the grantor must appear before him for the purpose of acknowledging the instrument, and his admission that he had executed it must be made with a view to give it authenticity. If in this case, as the excluded evidence tended to show, the notary's certificate was predicated upon the plaintiff's admission made while her deposition was being taken, and when she had no thought that she was acknowledging the deed in question, the act of the notary, however fair his intent, was false in fact, and in law a nullity." That case did not involve the exact question now before the court, because it appeared that the person then claiming the land was not a purchaser for value upon the faith of the certificate in question, but it decides that a certificate of acknowledgment which falsely recites that the grantor in a deed appeared before him is not conclusive of the fact of appearance.

We do not think it necessary to enter into argument to support the conclusions that we have expressed in our answer to the foregoing questions, for the reason that they are supported by all authority that we have been able to find except the courts of the states of Illinois and Kentucky; the decisions in the latter state are controlled by statute. We will, however, quote from *Pickins v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, the reasons given by that court in support of its decision: "For reasons ⁶⁸⁴ of public policy, and to protect innocent purchasers, it has been uniformly held that when a married woman appears before a justice for the purpose of acknowledging a deed, and does in some manner attempt to do what the law requires to be done, the certificate is conclusive of the facts therein stated as regards innocent purchasers. This is a necessary rule of law, and not a harsh one to her; because, if the justice has not asked her all the questions required, or has omitted anything which the statute requires, as fully explaining the deed to her, she may notify the purchaser of that fact before the deed is delivered to him, and thus prevent it from operating to pass her title to the prop-

erty. But where she has not appeared before the officer she has no opportunity to save her property, any more than the man has whose name is forged to a negotiable note. In the case of the note no one would hesitate to say that it would be void in the hands of an innocent holder for value. Why, then, should it be said that the married woman should be held for the act of the justice which was as much without authority or warrant in law as the forgery of the man's name to the note? A married woman's signature to a deed amounts to nothing in anyone's hands, as to her, until she has acknowledged the deed before a proper officer after privy examination, and he has certified that all the requirements of the statute have been complied with, and the deed has been recorded. She ought to have the same right to impeach the certificate of her appearance before the officer making it, when in fact she did not appear before him, that a man has to prove a deed professing to be signed by him to be a forgery. The rights of property are too sacred to allow them to be swept away without the knowledge of the owner, when he has made no contract of sale with the pretended purchaser. No consideration of public policy can justify the robbing of a married woman of her separate estate."

Our conclusions are based upon the alleged fact that Mrs. Wheelock did nothing that called upon the officer to exercise his authority to take her acknowledgment to the deed. No phase of the case that might estop her to deny the truth of the certificate has been considered.

MARRIED WOMAN'S DEED—ACKNOWLEDGMENT—CONCLUSIVENESS OF CERTIFICATE—ESTOPPEL.—The certificate of acknowledgment of a deed by a married woman may be impeached by proving that she never in fact appeared before the officer or acknowledged the deed to him; and this rule may be enforced against an innocent purchaser without notice: *Grider v. American Freehold Land etc. Co.*, 99 Ala. 281; 42 Am. St. Rep. 58. Any conveyance made by a married woman in which the statute is not strictly complied with is void as to her, and cannot bind her by estoppel: See monographic note to *Trimble v. State*, 57 Am. St. Rep. 170, on estoppel against married women. If, however, a married woman appears before an officer for the purpose of making an acknowledgment, and attempts to do, in some manner, what the law requires to be done, the certificate is conclusive of the facts therein stated, as regards innocent purchasers: *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622, and note. Compare monographic note to *American Freehold Land etc. Co. v. Thornton*, 54 Am. St. Rep. 153, on the conclusiveness of certificates of acknowledgments of deeds.

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ACCOUNTS.

1. ACCOUNTS—LIQUIDATION OF, BY GIVING NOTES—RECOVERY.—If one accepts from another, in liquidation of an open account, a negotiable promissory note, he cannot recover in a suit upon the original cause of action, unless, upon the trial, he produces the note or satisfactorily accounts for its absence. (Jackson v. Brown, 156.)

2. ACCOUNTS—LIQUIDATION OF, BY GIVING NOTES—ERRONEOUS INSTRUCTION.—In an action upon an open account, it is error to practically direct a verdict for the plaintiff, where the evidence is conflicting as to whether or not a negotiable promissory note was given in liquidation of the account, but there is sufficient to justify a finding that such a note was given. (Jackson v. Brown, 156.)

ACKNOWLEDGMENT.

1. ACKNOWLEDGMENT—MARRIED WOMAN'S DEED—FALSE CERTIFICATE—EFFECT OF—NOTICE OF GRANTEE.—Although a deed which purports to convey the separate property of a married woman has attached to it a notary's certificate, as prescribed by statute, and regular in form, such deed does not divest her of title, or estop her from recovering the land from the grantee therein named, where she alleges and proves that the certificate is false; that, as a matter of fact, she did not appear before the officer who made the certificate; and that he did not take her acknowledgment or attempt to do so; and she may do this without alleging and proving that the grantee had notice of, or participated in, the fraud. (Wheelock v. Cavitt, 920.)

2. ACKNOWLEDGMENT—MARRIED WOMAN'S DEED—APPEARANCE FOR PURPOSE OF ACKNOWLEDGMENT—EFFECT OF.—If a married woman who has, with her husband, signed a deed conveying her separate real estate, appears before an officer, authorized by law, for the purpose of acknowledging the conveyance, and the officer makes a certificate showing compliance with the law, such certificate, though the officer failed to do his duty in taking the acknowledgment, is conclusive upon the married woman, in favor of an innocent purchaser, who paid value for the property, without notice of the officer's dereliction of duty. (Wheelock v. Cavitt, 920.)

3. ACKNOWLEDGMENT—MARRIED WOMAN'S DEED—NONAPPEARANCE FOR PURPOSE OF ACKNOWLEDGMENT—EFFECT OF.—Although a married woman, with her husband, signed a deed conveying her separate real estate, the certificate of a notary that her acknowledgment thereof was taken in the manner prescribed by statute, however formal, is not binding upon her, even in favor of an innocent purchaser, and for value without notice, where it is shown that she never invoked the notary's authority respecting an acknowledgment of the execution of the deed; that she never appeared before him for the purpose of such

acknowledgment; and that no acknowledgment was, in fact, ever made. (*Wheelock v. Cavitt*, 920.)

ACTIONS.

1. **THE SUBJECT OF AN ACTION** is not the property which has been seized under attachment issued therein, but is the cause of action which the plaintiff seeks to assert against the defendant. (*Hartzell v. Vigen*, 589.)

2. **ELECTION BETWEEN INCONSISTENT REMEDIES.**—One having a right to appeal to either of two courts, on appealing to one of them, irrevocably elects to pursue his remedy and cannot afterward appeal to the other. He cannot dismiss the appeal taken and then resort to an appeal to the other court. (*Field v. Great Western Elevator Co.*, 611.)

See Corporations, 10, 11; Limitations of Actions.

ADULTERY.

1. **ADULTERY AND FORNICATION—INDICTMENT—SUFFICIENCY OF.**—Under an indictment for adultery, with proper allegations, a conviction can be had, under proper evidence, for fornication. It is a question of allegation, and not as to whether one offense includes the other; but in such case all the elements of fornication must be charged to support the conviction. (*Cosgrove v. State*, 802.)

2. **FORNICATION—INDICTMENT** for fornication, which fails to allege that both parties to the offense were unmarried, is fatally defective. Hence a conviction for fornication cannot be had under an indictment for adultery alleging that the man has a wife living, although such allegation is untrue. (*Cosgrove v. State*, 802.)

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION UNDER PAROL GIFT—MORTGAGE BY DONOR—STATUTE OF LIMITATIONS.**—Possession of land by a donee under a parol gift, accompanied by a claim of ownership, is adverse to the donor, and the execution of a mortgage by the latter after such entry by the donee does not change the character of his holding nor operate to suspend the running of the statute of limitations in his favor. (*Schafer v. Hauser*, 403.)

2. **EASEMENT—ADVERSE POSSESSION OF LANDS WHICH ARE SUBJECT TO.**—One who holds possession of lands which are subject to the right of way of a railroad cannot acquire prescriptive title as against such railroad, so long as the purposes for which he uses them are not inconsistent with the right of way. The possession cannot be adverse until the railroad needs the property so possessed for railroad purposes. (*Railroad v. French*, 752.)

3. **POSSESSION, ADVERSE, OF THE SURFACE OF THE SOIL, WHETHER INCLUDES MINERALS.**—The possession of the surface of the soil by the owner for the purpose of tillage does not give him any possession of gas or other minerals beneath the surface. (*Murray v. Allred*, 740.)

4. **MINERALS.—PRESCRIPTIVE TITLE TO COAL OIL** and other minerals beneath the surface of the earth is not acquired by the occupation of the land for tillage under a claim of title. (*Murray v. Allred*, 740.)

AGENCY.

1. **AGENCY—EVIDENCE OF.**—A letter directing a person to make demand for property about to be replevied is admissible to show the agent's authority as such. (*State Bank v. Waterhouse*, 82.)

2. AGENCY—EXISTENCE OF, WHEN A QUESTION OF FACT.—If the evidence in support of a claim of agency is undisputed, then whether there was an agency is a question of law for the court; but if the evidence is disputed, the question presented is one of mixed law and fact, to be considered and determined by the jury. (Willcox v. Hines, 761.)

3. AGENCY—NONEXISTENT PRINCIPAL—AGENT'S LIABILITY.—It is a general rule that one who assumes to act as agent for a principal who has no legal status or existence renders himself individually liable on contracts so made; but this rule is founded upon the presumption that the parties intended to create an enforceable obligation, and does not obtain when it appears, either by express agreement or from the circumstances, that the agent is not to be charged. (Coddington v. Munson, 524.)

4. AGENCY—NONEXISTENT PRINCIPAL—PLEADING—INSTRUCTIONS.—If a petition declares solely on a contract made directly with the defendant, and a promise by him to pay, the jury should be instructed, where the defendant claims to be an agent for a principal having no legal status, that the defendant is liable, unless the agreement was, that the plaintiff was to look to another to perform its obligation, and it is error to submit to them the theory that the defendant was agent for another and had received from his principal money to the use of the plaintiff. (Coddington v. Munson, 524.)

5. AGENCY—UNDISCLOSED PRINCIPAL—CONVEYANCE OF LAND.—The rule that an undisclosed principal when subsequently discovered may be held liable upon a contract made with his agent, who, at the time, was supposed to be acting for himself, does not apply to a conveyance of real estate, whether the instrument is sealed or not. (Sanger v. Warren, 913.)

6. AGENCY—UNDISCLOSED PRINCIPAL—CONVEYANCE OF LAND.—If one conveys land, retaining a vendor's lien thereon, and the purchaser conveys it to a third person, who buys for others, and assumes the payment of purchase money notes given to the original vendor, such other persons are not answerable as the undisclosed principals of the second vendee, upon his contract assuming the payment of the notes for the rule governing the liability of an undisclosed principal does not apply to such a contract. (Sanger v. Warren, 913.)

7. AGENCY—ATTORNEY HOLDING CLAIM FOR COLLECTION—AUTHORITY—NOTICE.—A debtor who deals with an attorney holding a claim against him for collection is bound to take notice of the attorney's authority. (Cram v. Sickel, 478.)

8. AGENCY—AUTHORITY OF ATTORNEY FOR COLLECTION.—An attorney who holds a claim for collection has no authority to receive anything in payment of such claim except money, unless especially authorized to do so by his principal, nor to release one of two joint debtors in consideration of the other giving security for the debt. (Cram v. Sickel, 478.)

9. AGENCY—REPUDIATION OF UNAUTHORIZED CONTRACT.—If a principal repudiates the unauthorized contract of his agent within a reasonable time after being informed thereof, and restores to the owner all fruits which have come into his hands as the result of such unauthorized contract, he cannot be held liable thereon. (Cram v. Sickel, 478.)

10. AGENCY—ESTOPPEL AS TO UNAUTHORIZED ACTS.—In order to estop a principal because of his approval of an unauthorized act of his agent, it is not enough to show that he has in some manner approved of such act; but it must also appear that he

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See Deeds, 9-11; Insurance, 4; Sales.

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ANIMALS.

1. **DOGS—PROPERTY IN.**—The owner of a dog has such property therein as will sustain an action for negligently injuring and killing it. (*Citizens' Rapid Transit Co. v. Dew*, 754.)

2. **DOGS—RAILWAYS.**—A DOG is an animal such as the statute contemplates in providing statutory precautions when they appear on railway tracks. (*Citizens' Rapid Transit Co. v. Dew*, 754.)

3. **THE KILLING OF A DOG BY HIS OWNER**, to prevent his suffering after he has been fatally injured through the negligence of a street railway, does not prevent the owner from recovering therefor. (*Citizens' Rapid Transit Co. v. Dew*, 754.)

4. **EVIDENCE OF A DOG'S PEDIGREE** and of the qualifications and performances of his ancestors is competent for the purpose of proving his value. (*Citizens' Rapid Transit Co. v. Dew*, 754.)

5. **THE PEDIGREE OF A DOG** may be established by common and general reputation and by registries made in certain books, which are shown to be kept for the information of the public and to be commonly received as satisfactory evidence of pedigree. (*Citizens' Rapid Transit Co. v. Dew*, 754.)

APPEAL.

1. **STARE DECISIS.**—A construction of the complaint by the supreme court on the appeal of one of the defendants, is not conclusive on the appeal of the other defendants, wherein it appears that they are liable to the plaintiff, and the appellant in the prior appeal is not. (*March v. Barnet*, 44.)

2. **APPEAL—UNDERTAKING ON CANNOT BE WAIVED.**—The giving of an undertaking on appeal is jurisdictional and cannot be waived by the respondent, unless the statute authorizes such waiver. (*Brown v. Chicago etc. Ry. Co.*, 730.)

3. **APPELLATE PRACTICE.**—The supreme court has power, on appeal, to render such judgment as the trial court should have directed. (*Nighbert v. Hornsby*, 738.)

4. **APPELLATE PRACTICE.**—A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject to review on proceedings in error. (*Nichols v. Peck*, 122.)

5. **APPELLATE PRACTICE—EVIDENCE NOT OBJECTED TO.**—Questions asked and answers elicited from a witness, without objection or motion to strike out on the trial, cannot be considered on appeal. (*Howard v. State*, 812.)

6. **JURY TRIAL—INSTRUCTIONS.**—A reversal will not be directed because of the refusal of the trial judge to give an instruction unless it is strictly accurate. (*Willcox v. Hines*, 761.)

7. **JURY TRIAL—PRESUMPTION AS TO INSTRUCTIONS.**—Where the charge of the trial judge is not disclosed by the record, the appellate court will presume the jury was correctly instructed

on all questions of law arising upon the evidence in the case. (*Night v. Hornsby*, 736.)

8. TRIAL-INSTRUCTIONS.—The giving of inconsistent and contradictory instructions with respect to a material issue is reversible error. (*Henry v. State*, 450.)

9. JURY TRIAL—ESTOPPEL TO OBJECT TO INSTRUCTIONS.—If a litigant asks for instructions, which are not given, but similar instructions are given at the request of his adversary, the former is estopped from urging, on appeal, that such instructions are erroneous. (*Illinois Cent. R. R. Co. v. Beebe*, 253.)

10. APPELLATE PRACTICE—NONJOINDER—OBJECTIONS. An objection that persons, not made parties, are jointly liable with the defendant, cannot be raised for the first time on appeal. (*Clarke v. O'Rourke*, 389.)

11. APPEAL—WAIVER OF JURY—PRESUMPTION.—If the record shows that a jury was waived at a preceding term, such waiver will be presumed to have been general and not confined to the term at which it was made. (*Boslow v. Shenberger*, 487.)

12. INSTRUCTIONS—CRIMINAL LAW—ALIBI.—A failure to instruct the jury upon the defense of an alibi is not reversible error, where no request was made for such an instruction. (*Ferguson v. State*, 512.)

13. APPELLATE PRACTICE.—If a motion for a new trial is made, and the order denying it is not appealed from, the sufficiency of the evidence to sustain the findings cannot be reviewed on an appeal from the judgment. (*Parrish v. Mahany*, 715.)

14. APPELLATE POWERS IN CRIMINAL CASES.—THE COURT OF APPEALS, OF KENTUCKY, IS NOT, IN A CRIMINAL CASE, authorized to examine the testimony, but is confined exclusively, to a review of errors of law appearing of record, and which affect the substantial rights of the accused. (*Jackson v. Commonwealth*, 336.)

15. APPELLATE PRACTICE—MODIFYING JUDGMENT INSTEAD OF DIRECTING A NEW TRIAL.—If, in an action to recover damages the trial court enters judgment for a sum greater than warranted by the allegations of the complaint, but the findings necessarily show such allegations are true, the judgment may be modified in the appellate court by striking off the excess and affirming as to the residue. (*Kerry v. Pacific Marine Co.*, 65.)

See Jurisdiction; Receivers, 2.

APPLICATION OF PAYMENTS.

See Debtor and Creditor, 1.

APPORTIONMENT.

See Mortgages, 7-9.

APPROXIMATION.

See Wills, 1.

ASSAULT.

1. ASSAULT—INTENT TO INJURE—INSTRUCTIONS.—On a trial for aggravated assault by an adult male upon a female child about eight years of age, by holding her between his legs with his privates exposed, and making indecent proposals to her, while she attempted to get away, and entreated him to let her go, it is proper to charge the jury that, in order to convict, they must believe that the accused intended to injure the girl, and further, in the words of

the statute, that "where an injury is caused by violence to the person, the intent to injure is presumed, and it rests upon the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind." (Hill v. State, 803.)

2. **ASSAULT—CONSENT OF CHILD.**—A conviction for an aggravated assault by an adult male upon a female child eight years of age may be sustained without any proof of the want of consent of the child, or instruction in relation thereto. An assault committed upon a child of such tender years is criminal, whether with or without her consent, as legally she has no will either to resist or to consent, and there may be an actual submission of such child without constituting legal consent. (Hill v. State, 803.)

3. **ASSAULT—EVIDENCE OF AGE OF FEMALE.**—Under an indictment charging an aggravated assault by a male upon a female, evidence is admissible to prove the age of the female, although that is not alleged in the indictment. (Hill v. State, 803.)

ASSIGNMENT FOR BENEFIT OF CREDITORS.

CORPORATIONS — UNAUTHORIZED ASSIGNMENT — ASSIGNEE AS BAILEE—RIGHTS OF ATTACHING CREDITOR.—An unauthorized assignment by an insolvent corporation, transfers all of its property to the assignee as bailee, in trust, for the benefit of its creditors, and he thereafter holds as bailee and not as assignee; and an attaching creditor, without levy of attachment, acquires no priority of right to the property over other creditors. (Calumet Paper Co. v. Haskell etc. Printing Co., 425.)

See Attachment, 2; Corporations, 3-9.

ASSOCIATIONS.

See Religious Societies.

ATTACHMENT.

1. **CORPORATIONS — INSOLVENCY — GARNISHMENT.**—Property of an insolvent corporation held in trust for the benefit of all its creditors and stockholders is not subject to garnishment by one of them. (Calumet Paper Co. v. Haskell Printing Co., 425.)

2. **CORPORATIONS—ASSIGNMENT—EFFECT OF GARNISHMENT WITHOUT ATTACHMENT.**—Service of garnishment on the assignee of a corporation without the levy of an attachment on its property, does not transfer such property to the officer nor give him any right to control it, and the attachment creditor acquires no lien. (Calumet Paper Co. v. Haskell etc. Printing Co., 425.)

See Contempt, 15; Corporations, 5, 9; Judgment, 6, 7.

ATTORNEY AND CLIENT.

1. **ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.**—THE TEST by which to determine whether a communication is or is not privileged, under the Georgia statute, is, How did the matter or thing claimed to be privileged become known to the witness? If by virtue of his relations as attorney, he cannot testify; but he can testify where he has acquired knowledge thereof in any other manner. (O'Brien v. Spalding, 202.)

2. **ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—WAIVER OF PRIVILEGE BY CLIENT.**—A client is not permitted, under the statute of Georgia, to waive the protection afforded to him by the rule concerning privileged communications. (O'Brien v. Spalding, 202.)

3. ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—TESTAMENTARY DISPOSITIONS.—The common-law rule declaring that communications between attorney and client are privileged does not apply to testamentary dispositions, as the purpose of investigating the circumstances attending the execution of a will is to do full and complete justice, not only to the living, but to the dead. (O'Brien v. Spalding, 202.)

4. ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—PURPOSE OF COMMON-LAW RULE.—The purpose of the common-law rule, declaring that communications between attorney and client are privileged, is to protect the client, and strangers cannot invoke this rule in their own behalf. Hence those who claim under a testator, but not adversely to him, and who seek an investigation into the circumstances attending the execution of his will, cannot invoke this rule. (O'Brien v. Spalding, 202.)

5. ATTORNEY AND CLIENT.—Knowledge of an attorney gained in the very business in respect to which he is attorney is imputed to his client. (Sweeney v. Pratt, 101.)

See Wills, 8-11.

BAILMENT.

1. BAILMENTS—THEFT OF GOODS.—A letter from a retail jeweler to a wholesale dealer in diamonds, stating that the former has a customer for a diamond, and requesting the wholesaler to send him some diamonds to keep for some time, as the customer is slow on selection, is simply a request to send the stones with the option to purchase. The custody of the goods thus sent is in the nature of a bailment, and the title remains in the sender. Hence, if the goods are stolen while in such custody, without the fault or negligence of the custodian, the sender must bear the loss. (Knights v. Piella, 875.)

2. BAILMENTS.—CARE REQUIRED of a bailee in case of bailment for mutual benefit of the parties is that degree of care and diligence to be expected from ordinarily prudent persons under similar circumstances. (Knights v. Piella, 875.)

3. BAILMENTS—EVIDENCE—BURDEN OF PROOF.—In an action by a bailor to recover the value of goods from the bailee upon failure of the latter to redeliver, the burden of proof is upon the bailee to establish the loss by theft of the goods if he relies thereon. Such proof, prima facie, excuses the failure to redeliver unless want of due care on his part is disclosed, and the burden of proof is then cast upon the bailor to show want of such care. (Knights v. Piella, 875.)

4. BAILMENTS—EVIDENCE.—The defense that goods which were the subject of a bailment were stolen from the bailee is admissible under the general issue, in an action by the bailor to recover the value of the goods from the bailee upon his failure to redeliver. (Knights v. Piella, 875.)

5. BAILMENTS—EVIDENCE.—Neither a purchase nor an unconditional promise to return diamonds is shown by a letter from a retail jeweler to a wholesale dealer, from whom he has received the diamonds, with the privilege to purchase, stating that the goods have been stolen and promising to pay for them. Such letter does not affect the relation of bailor and bailee existing between the parties. (Knights v. Piella, 875.)

BANKS.

1. BANKS—DEPOSIT OF SCHOOL MONEY—INSOLVENCY—TRUST FUND—PREFERRED CLAIM.—If the treasurer of a

school district deposits money in a bank, which is at all times advised of the fact that the money so deposited belongs to the school district, a trust results in favor of the beneficial owner, and, upon the insolvency of the bank, its estate is chargeable with the full amount of the deposit, to the prejudice of nonpreferred creditors. (State v. Midland State Bank, 484.)

2. DEBTOR AND CREDITOR—BANK AND SCHOOL DISTRICT—DEPOSIT OF SCHOOL FUNDS.—A general deposit of school district funds, held by the treasurer of a school district, does not create the relation of debtor and creditor between such district and the bank in which such funds are deposited, as the treasurer has no power to create such relation. (State v. Midland State Bank, 484.)

3. BANKS—TRUST FUND—MISAPPROPRIATION—INTEREST.—If a trustee deposits a trust fund in a bank, which misappropriates a part thereof, and a demand is made upon the bank by the true owner for the amount which has been misappropriated, as well as for the amount admitted to be due, but the bank refuses payment under such demand, it becomes liable for interest upon the whole amount from the date of such refusal. (American Trust etc. Co. v. Boone, 167.)

4. BANKS—OWNERSHIP OF TRUST FUND—MISSTATEMENT BY TRUSTEE—LIABILITY.—If a person owes a debt to a bank and afterward deposits therein, to his individual credit, a check representing a trust fund, his statement to the bank that he owns such fund, though acted upon by the bank, does not exempt it from liability to the owner of such fund, when it appears that such statement was not true, and that the bank knew, by entries upon the check, that the deposit was impressed with a trust. (American Trust etc. Co. v. Boone, 167.)

5. BANKS—AIDING IN MISAPPROPRIATION OF TRUST FUND—LIABILITY.—If a bank actively aids a trustee in misappropriating a trust fund, such as money deposited by him in the bank, it is answerable to the true owner for the amount wrongfully appropriated by it to its own uses, particularly where it participates in the misappropriation, and receives the fruits thereof by obtaining payment of a debt due it by the trustee in his individual capacity. (American Trust etc. Co. v. Boone, 167.)

6. BANKS—TRUST FUND—PRESUMPTION—PAYMENT OF CHECKS.—A bank has a right to assume that money deposited therein by a trustee will be properly applied under the trust. Hence, it may lawfully pay checks drawn by him, whether signed in his representative capacity or not. (American Trust etc. Co. v. Boone, 167.)

BOARD OF EQUALIZATION.

See Taxation.

BONA FIDE PURCHASERS.

See Acknowledgment, 2, 3; Estates, 2; Vendor and Purchaser, 3.

BONDS.

See Chattel Mortgages, 11; Officers, 2.

BURDEN OF PROOF.

See Bailment, 3; Corporations, 9; Insurance, 18; Judgment, 13.

BURGLARY.

1. BURGLARY—BREAKING—WHAT IS.—A breaking, to constitute the crime of burglary, may be by any act of physical force,

however slight, by which the obstruction to entering is removed. (Ferguson v. State, 512.)

2. BURGLARY—BREAKING—ILLUSTRATIONS.—The lifting of a hook by which a door is fastened, and opening the door in order to enter a building, is a "breaking" within the law of burglary, although the entry might have been effected without a breaking, as through an open door. (Ferguson v. State, 512.)

3. BURGLARY—INSTRUCTIONS.—A SLIGHT ERROR in an instruction, whereby a matter, not in evidence, is injected into a prosecution for burglary, is no ground for reversal, where it is evident that the rights of the defendant were not prejudiced by the inaccuracy. (Ferguson v. State, 512.)

4. BURGLARY—INFORMATION—TIME AS TO COMMISSION OF CRIME.—It is not essential to a conviction for burglary that the crime should have been committed on the precise day laid in the information. It is sufficient if it is proved to have been committed within the time limited by the statute for the prosecution of such crime. (Ferguson v. State, 512.)

5. BURGLARY—INSTRUCTIONS.—TIME is not of the essence of the crime of burglary, and it is not, therefore, error to instruct the jury that it is sufficient to find that the crime was committed "on or about" the time charged in the information, or at any time within the statute of limitations. (Ferguson v. State, 512.)

6. BURGLARY — LARCENY — INSTRUCTIONS — ASSUMING FACTS.—To instruct the jury that, under an information for burglary, the accused may be found guilty of larceny, does not assume that a burglary has been committed. (Ferguson v. State, 512.)

CARRIERS.

See Railroad Companies; Shipping, 1; Telegraph Companies, 1.

CAVEAT EMPTOR.

See Executors and Administrators, 3; Landlord and Tenant, 1.

CHARTER PARTY.

See Shipping, 2, 3.

CHATTEL MORTGAGES.

1. CONFLICT OF LAWS.—CHATTEL MORTGAGES executed in one state between parties domiciled therein, on property situated there and filed for record in that state, enable the mortgagee to claim the protection of the laws of that state in another state to which the property is removed and there sold or disposed of. (Wilson v. Rustad, 649.)

2. CHATTEL MORTGAGE—CONFLICT BETWEEN AND A LABORERS' LIEN.—A statutory laborers' lien for services performed upon a growing crop is subordinate to the lien of a pre-existing chattel mortgage. (Wilson v. Donaldson, 17.)

3. CHATTEL MORTGAGE—UNPLANTED CROP.—Under a statute providing that an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence, and that the lien attaches from the time when the party agreeing to give it acquires an interest in the thing, a valid mortgage may be made upon an unplanted crop, and a mortgage lien will attach to the crop as soon as it comes into existence through the agency of the mortgagor. (Donovan v. St. Anthony etc. Elevator Co., 674.)

4. **MORTGAGE.—A BILL OF SALE OF PERSONAL PROPERTY** taken to secure a debt, but not acknowledged nor recorded, as required by statute respecting chattel mortgages, is void against creditors, unless the mortgagee is in possession of the property. (Second Nat. Bank v. Gilbert, 306.)

5. **IF A BILL OF SALE TO SECURE THE PAYMENT OF A DEBT** is followed by a chattel mortgage of the same property to secure the same debt, the former is supplanted by the latter, and the grantee of the bill of sale is no longer deemed to be in possession thereof. (Second Nat. Bank v. Gilbert, 306.)

6. **CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION—WHO MAY QUESTION.**—The question of the sufficiency of the description of property in a chattel mortgage is one of law and not of fact, and, if such description is sufficient as between the mortgagor and mortgagee, it cannot be questioned by a stranger to the title of the mortgagor. The sufficiency of such description can be questioned only by a purchaser in good faith from the mortgagor or his vendee, or by one who claims protection under the law requiring chattel mortgages to be recorded. (Wilson v. Rustad, 649.)

7. **CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION—SELECTION BY MORTGAGEE.**—If a mortgagor has a herd of three hundred mares branded, "F2," a chattel mortgage of "Fifty (50) mares branded F2" furnishes no descriptive matter which, when applied to the herd, will enable one to ascertain the very animals intended to be conveyed, but it does confer an implied right upon the mortgagee to select the fifty mares from the three hundred, and is, therefore, valid as to the matter of description. (Oxsheer v. White, 863.)

8. **CHATTEL MORTGAGE—GIVING POWER TO SELECT SUBJECTS OF.**—A chattel mortgage is not void for want of identity and description of the property mortgaged, if the instrument, though containing no specific descriptive matter, yet confers an implied power to select the identical property mortgaged from other property of a like character and description. (Oxsheer v. White, 863.)

9. **CHATTEL MORTGAGE—TIME OF ELECTION—FORECLOSURE.**—If it is necessary for a mortgagee of fifty mares, branded "F2," to select the animals from a herd of three hundred mares in that brand, before the property mortgaged can be identified, it would be better to require the selection to be made before, or at the time of, the foreclosure of the instrument, but neither the mortgagor nor a purchaser with notice can complain of a decree foreclosing upon fifty average head of the whole number. (Oxsheer v. White, 863.)

10. **CHATTEL MORTGAGES—TROVER—RIGHT OF MORTGAGEE TO MAINTAIN.**—A mortgagee of chattels, with a present right of possession, may maintain trover against a wrongdoer for the conversion of the mortgaged property. (Donovan v. St. Anthony etc. Elevator Co., 674.)

11. **BONDS—ACTION ON BOND TO HAVE PROPERTY FORTHCOMING AT INVALID EXECUTION SALE.**—A mortgagee in a proceeding to enforce a chattel mortgage by foreclosure and execution has no right of action upon a bond conditioned to have the property forthcoming at a time and place of sale, if the sale can never take place by reason of the invalidity of the execution under which the levy was made. (Reid v. Matthews, 164.)

12. **ESTOPPEL TO DENY POSSESSION.**—If a mortgage of chattels contains a statement that the mortgagors are in possession of the property and are lawfully possessed thereof as their own

property, the mortgagee is estopped to urge, as against creditors of the mortgagor, that the latter was not in possession of such property. (Second Nat. Bank v. Gilbert, 306.)

18. CHATTEL MORTGAGES—SUBSCRIBING WITNESSES.—Though a chattel mortgage is acknowledged as required by statute, its execution can be proved only by the testimony of the subscribing witnesses, unless an inability to procure their testimony is shown. (Brynjolfson v. Northwestern Elevator Co., 612.)

See Damages, 3; Execution, 15, 16.

CHECKS.

See False Pretenses, 1, 3, 4; Insane Persons.

CHURCHES.

See Religious Societies.

CLEARANCE CARD.

See Evidence, 4; Master and Servant, 9; Railroad Companies, 2.

COLLATERAL ATTACK.

See Executors and Administrators, 1, 2; Officers.

COMMON LAW.

See Mandamus; 1 Trial, 1.

CONFLICT OF LAWS.

See Chattel Mortgages, 1; Contracts, 6, 7; Negligence, 4.

CONSTITUTIONS.

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW.—The provision of the fourteenth amendment to the federal constitution, that no state shall deny to any person within its jurisdiction the equal protection of the laws, applies only to persons physically present within the jurisdiction of the state the protection of whose laws they invoke. (State v. Travelers' Ins. Co., 138.)

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW.—The provision of the federal constitution that all persons within the jurisdiction of the United States shall have the same right in every state to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like taxes, licenses, and exactions of every kind and to none other, does not apply to aliens who are not within the United States. (State v. Travelers' Ins. Co., 138.)

3. CONSTITUTIONAL LAW—CONSTRUCTION OF CLAUSE IN FEDERAL CONSTITUTION AS TO IMPAIRING OBLIGATION OF CONTRACTS.—The inhibition of the federal constitution against the passage of laws impairing the obligation of contracts relates to "property rights," and not to subjects purely "governmental," such as lottery franchises, though they have been paid for. (Commonwealth v. Douglass, 328.)

4. CONSTITUTIONAL LAW—RELIEF FROM COMMON-LAW LIABILITY—INTERSTATE COMMERCE.—The provision of the Kentucky constitution that no common carrier shall be permitted to contract for relief against its common-law liability does not conflict with the interstate commerce clause of that constitution. (Western Union Tel. Co. v. Eubanks, 361.)

CONTEMPT.

1. CONTEMPT.—TO CONSTITUTE CONSTRUCTIVE CONTEMPT of court, there must have existed, at the time, some order or writ within the jurisdiction of the court to make, which the alleged contemner has disobeyed or violated. (Ex parte Lake, 848.)

2. COURTS.—POWER GIVEN TO COURTS TO ENFORCE ORDERS can never reach beyond those made in the legitimate exercise of such power, and never to those orders which it has no authority, by reason of want of jurisdiction, or otherwise, to make. (In re Knaup, 435.)

3. CONTEMPT.—THE RIGHT TO PUNISH for contempt disobedience to all lawful mandates of a court is not a mere formal incident to a court, but an inherent power essential to its very existence, and granted as a necessary incident in its establishment. (In re Knaup, 435.)

4. CONTEMPT—IRREGULAR ORDER.—If the court has jurisdiction in the matter of making an order, and the order as made is irregular or improper in some mere matter of detail, it is still obligatory upon the party against whom it is issued, until set aside or reversed by some appellate court on appeal, and he may be punished for contempt for disobedience of, or resistance to, such order. (In re Knaup, 435.)

5. CONTEMPT—JURISDICTION.—Power conferred upon a court to commit to prison one who refuses to obey a writ of habeas corpus, to remain there until he is willing to obey such writ and pay all costs of the proceedings, is exclusive, and an officer who removes a prisoner pending an application for such writ cannot be punished until the writ has issued and the officer has disobeyed it. (Ex parte Lake, 848.)

6. CONTEMPT—JURISDICTION.—Unless the court has jurisdiction of the supposed contemner, or some order, decree, or process, within the jurisdiction of the court to make, has been resisted or disobeyed, the court has no power to punish for contempt. Jurisdiction over the party does not confer power to punish for contempt unless some such order, decree, or process has been disobeyed, or the party is guilty of some act of the nature of malpractice in the case, or has disobeyed reasonable rules of court. This rule does not apply to contempts arising from newspaper articles pertaining to pending cases. (Ex parte Lake, 848.)

7. CONTEMPT—JUDGMENT DURING VACATION.—An order or judgment of a court, made during vacation, adjudging a person guilty of contempt for default in the payment of alimony previously ordered to be paid is void, and may be attacked on habeas corpus. (Ex parte Ellis, 831.)

8. CONTEMPT.—PROCEEDINGS DURING VACATION of a court adjudging a person guilty of contempt in disobeying the previous order or judgment of the court are not judicial, but the personal acts of the judge at a time when he has no power to act, and for that reason void. (Ex parte Ellis, 831.)

9. CONTEMPT—FAILURE TO TURN PROPERTY OVER TO RECEIVER.—If an officer of an insolvent corporation, through direction of some of its stockholders, has obtained the transfer of part of its property to himself as an individual, the court having jurisdiction of the property of the corporation has authority to order him to turn such property over to the receiver for administration under the orders of the court, and, upon his failure to turn over the property in obedience to such order, he may be committed to jail for contempt. (Ex parte Tinsley, 818.)

10. CONTEMPT—FAILURE TO OBEY ORDER—PUNISHMENT.—If a court, in punishing for a contempt for failure to obey a valid order of the court to turn over certain property, merely fines the contemner and orders him into custody until he complies with such order, without imposing any imprisonment as part of the penalty, such punishment is not void as imposing an unlawful imprisonment. In such case, any imprisonment would be self-inflicted, as it might be avoided by paying the fine and obeying the order of the court. (Ex parte Tinsley, 818.)

11. CONTEMPT—ORDERING PROPERTY TURNED OVER TO RECEIVER—HABEAS CORPUS.—If a court has acquired jurisdiction over the property of an insolvent corporation and of a claimant thereto, or of a part thereof, its order on him to assign and turn over such property to a receiver for its preservation must be obeyed, however erroneous it may be; and the fact that the order may be too broad, and require the transfer of some of the property wrongfully, does not justify the claimant in refusing to obey. If the order is thus void in part, the remedy of the claimant is to apply to the court for a modification. If he fails to pursue this remedy, and disobeys the order, he may be committed for a contempt of court. Upon an appeal from the order committing him for contempt, or on habeas corpus proceedings for his release from such commitment, no error in the prior order requiring him to assign and turn over the property can be considered. The only question which can be presented is, whether the court had jurisdiction to make such prior order. (Ex parte Tinsley, 818.)

12. REPLEVIN AGAINST SHERIFF—CONTEMPT.—Property in the hands of an officer in a replevin suit is in the custody of the law and an attempt to wrest such possession from the officer by means of another action of replevin is a contempt of court. (Welter v. Jacobson, 632.)

13. EXECUTIONS—SUPPLEMENTAL EXAMINATION TO DISCLOSE ASSETS—COMMITMENT FOR CONTEMPT.—Under a statute providing that a defendant may be examined in court as to his means and ability to satisfy a judgment, he may be committed by the court for contempt in refusing to submit to such examination, but not for his refusal or failure to deliver to the court property which his examination has discovered. (In re Knaup, 435.)

14. EXECUTIONS—SUPPLEMENTAL EXAMINATION TO DISCLOSE ASSETS—COMMITMENT FOR CONTEMPT.—Under a statute, providing that defendant may be examined in court as to his means and ability to satisfy the judgment, the court has no power to commit him for contempt for failure to obey its order to deliver up bonds, notes, or other personalty which his examination shows he has on his person. (In re Knaup, 435.)

15. EXECUTIONS—GARNISHMENT IN AID OF—COMMITMENT FOR CONTEMPT—IMPRISONMENT FOR DEBT.—Under a statute providing that, if it shall be made to appear that any garnishee had, before his garnishment, executed to any defendant a negotiable promissory note which at the time of the garnishment was unpaid, the court may order the defendant to deliver such note into court, and, upon his failure or refusal to comply with such order, may attach his person, the court may, in garnishment proceedings against a corporation in aid of execution, commit the execution defendant to jail for failure to obey an order of court to deliver to it or to its receiver negotiable bonds of such corporation transferred to him and found to be in his possession under his examination in court as to his means and ability to satisfy the judgment, although it is beyond the power of the court, at the time of such examination, to commit him for contempt for his refusal to deliver to the court the property then found to be in his possession. Such

commitment for contempt in the garnishment proceeding is not an imprisonment for debt. (In re Knaup, 485.)

16. CONTEMPT—JURISDICTION—HABEAS CORPUS.—Proceedings adjudging a party guilty of contempt of a court having no jurisdiction of the subject matter or of the person are null and void, and the alleged contemner is entitled to his release on habeas corpus. (Ex parte Lake, 848.)

17. CONTEMPT—EXTRADITION—HABEAS CORPUS.—An extradition agent is not guilty of contempt of court in departing hastily and clandestinely from the state with his prisoner, after receiving him under a warrant issued by the governor pending an application by the prisoner for a writ of habeas corpus to secure his release from custody under another charge, although such agent, by his attorney, has protested against the issuance of the writ of habeas corpus. (Ex parte Lake, 848.)

See Habeas Corpus, 1, 2; Mandamus, 3.

CONTRACTS.

1. CONTRACTS—CONSIDERATION TO SUPPORT ACTION.—A mere naked promise, without consideration, from one to another, for the benefit of a third person, cannot sustain an action. (Hicks v. Hamilton, 431.)

2. CONSIDERATION—PAYMENT OF—WHEN CANNOT BE DISPUTED.—If the payment of a consideration is recited in a contract, the parties are estopped from disputing such payment for the purpose of destroying the effect and operation of the contract. (McPherson v. Fargo, 723.)

3. CONTRACT—RIGHT TO WITHDRAW FROM.—Where the terms of a contract are reduced to writing and signed by one of the parties, with the understanding that it shall be signed by the other, the former cannot withdraw from the contract on the ground that the latter has not signed it, unless such signing has been requested and a reasonable time given to comply with the request. (McPherson v. Fargo, 723.)

4. STATUTE OF FRAUDS—SIGNATURE BY ONE PARTY ONLY.—Only the party to be charged is required to sign an agreement under the statute of frauds. (McPherson v. Fargo, 723.)

5. CONTRACT—SIGNING BY ONE PARTY—WHEN NOT NECESSARY BY THE OTHER.—When an agreement is reduced to writing respecting the purchase and sale of real property executed by the vendor and left with a third person with the understanding that it shall be signed by the purchaser, who thereafter accepts and places it of record, but without signing it, it thereby becomes binding on all of the parties, and the vendor cannot afterward recede therefrom. (McPherson v. Fargo, 723.)

6. CONTRACTS—THE LAW OF THE PLACE where a contract is to be performed governs, subject to the rule that a contract, void by the law of the place where made, is void everywhere. (Western Union Tel. Co. v. Eubanks, 361.)

7. CONFLICT OF LAWS—CONTRACT TO BE PARTLY PERFORMED IN TWO OR MORE STATES.—If a contract is entire and indivisible, and is to be partly performed in the state where it is made and partly in other states, the law of the former controls its validity, and any stipulation which is invalid in the state where it is entered into is invalid everywhere. (Illinois Cent. R. R. Co. v. Beebe, 253.)

8. PRACTICE—QUESTION OF LAW, WHAT IS.—Whether the parties assented to a contract is a question of law when the facts are not disputed. (McPherson v. Fargo, 723.)

See Insane Persons, 1, 2.

CONVEYANCES.

See Agency, 5, 6; Deeds.

CORPORATIONS.

1. CONSTITUTIONAL LAW—STATE'S RIGHTS AS TO ALIENS.—A state has the right to debar aliens from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. Aliens may be excluded from membership in domestic corporations, unless they enter them on conditions which subject their investments to such burdens of taxation as the state may think proper to impose. (*State v. Travelers' Ins. Co.*, 138.)

2. FOREIGN CORPORATIONS—PLEADINGS.—Though a foreign corporation is prohibited from maintaining an action unless it complies with provisions of the statutes of the state, it need not allege such compliance in its complaint. In the absence of any showing to the contrary, it will be presumed to have complied, and, if it has not, the defendant must plead that fact in his answer. (*Acme Mercantile Agency v. Rochford*, 714.)

3. CORPORATIONS—ASSIGNMENT—RATIFICATION AFTER ATTACHMENT.—A ratification of a void corporate assignment by the board of directors, after a corporate creditor has commenced suit in attachment, and summoned the assignee as garnishee, does not affect the rights of the attaching creditor. (*Calumet Paper Co. v. Haskell etc. Printing Co.*, 425.)

4. CORPORATIONS—ASSIGNMENT—RATIFICATION.—A corporate assignment, unauthorized by the board of directors, can be ratified only by such board as a body, and not by its members severally. (*Calumet Paper Co. v. Haskell etc. Printing Co.*, 425.)

5. CORPORATIONS—VOID ASSIGNMENT—HOW MAY BE ATTACKED.—A void assignment by an insolvent corporation may be attacked in a suit in attachment by the creditors of the corporation. (*Calumet Paper Co. v. Haskell etc. Printing Co.*, 425.)

6. CORPORATION—VOID ASSIGNMENT.—An assignment by a corporation executed by two of its five directors is void for want of authority. (*Calumet Paper Co. v. Haskell etc. Printing Co.*, 425.)

7. CORPORATIONS—ASSIGNMENTS.—As a general rule, a corporate assignment must be executed by the board of directors, or a quorum thereof, at a meeting duly called for that purpose, or by the president or some other officer of the corporation, as authorized by the directors. (*Calumet Paper Co. v. Haskell etc. Printing Co.*, 425.)

8. CORPORATIONS—INSOLVENCY.—AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS by an insolvent corporation must be made by resolution of the board of directors. Such resolution cannot be passed when a minority only of such board is present. (*Calumet Paper Co. v. Haskell etc. Printing Co.*, 425.)

9. CORPORATIONS—ASSIGNMENT—ATTACK.—An assignment by an insolvent corporation is not a judicial proceeding, and anyone asserting rights under it, as against a stranger, has the burden of proof to show at least an assignment valid on its face. The other party may show that it is invalid by reason of extrinsic facts, or that it was unauthorized by a legal meeting of the directors. The validity of such an assignment may be attacked by a creditor of the corporation, by suit in attachment, or other collateral proceeding. (*Calumet Paper Co. v. Haskell etc. Printing Co.*, 425.)

10. CORPORATIONS.—A SUIT FOR DIVIDENDS declared by a corporation cannot be maintained until a demand is made. (*Winchester etc. Turnpike Co. v. Wickliffe*, 356.)

11. CORPORATIONS.—A RIGHT OF ACTION FOR DIVIDENDS declared by a corporation accrues when each dividend is declared. (Winchester etc. Turnpike Co. v. Wickliffe, 356.)

See Assignment for Benefit of Creditors; Attachment; Limitations of Actions, 7; Receivers; Taxation, 1-7

COTENANCY.

1. COTENANCY—PARTITION—OUSTER—LIABILITY FOR RENTS.—If neither cotenant occupies the common property for his own use, and one of them rents it, or any part of it, to third persons and collects the rents, or if he denies the right of the other to a part thereof, and thereby, pro tanto, ousts him, an accounting may be had in a suit for partition, if there is anything due at the time that suit is begun and such relief is asked at that time, and, if not, a suit in equity for an accounting may be maintained after the termination of the partition suit. (Bates v. Hamilton, 407.)

2. COTENANCY—RIGHTS TO RENTS.—The rights of cotenants to accruing rents, issues, and profits, from the common property, do not depend upon an express contract between them. They attach as incidents to their ownership of the res. (Bates v. Hamilton, 407.)

3. COTENANCY—LIABILITY FOR RENTS—ACCOUNTING.—If one tenant in common collects rents from the common property, he becomes a trustee of the amount collected for the benefit of all the tenants in common, in the proportion of their respective holdings, and a proceeding in equity for an accounting is a proper remedy, if the rights of the other tenants are denied, or if the tenant refuses to give them their respective shares. (Bates v. Hamilton, 407.)

4. COTENANCY—LIABILITY FOR RENTS AND INTEREST.—If a cotenant collects the rents arising from the common property, and refuses to pay any part of them over to his cotenants for a long time, he is liable for interest thereon from the time he collected them, although he has made no interest himself. (Bates v. Hamilton, 407.)

5. COTENANCY—MANAGEMENT OF PROPERTY AS TRUSTEE.—If a cotenant, as trustee of the common property, exercises proper diligence, and acts upon the advice of counsel, he is not liable for losses occurring from matters as to which it is doubtful what the law really is. (Bates v. Hamilton, 407.)

6. COTENANCY—MANAGEMENT OF PROPERTY AS TRUSTEE.—A cotenant, as trustee of the common property, is not liable for losses thereto, if he acts in good faith, and exercises such care as an ordinarily prudent man would employ in the management of his own affairs. (Bates v. Hamilton, 407.)

7. COTENANCY—PAYMENT OF TAXES—REIMBURSEMENT.—Upon the death of one of two cotenants, it is the duty of the survivor to pay the taxes for the current year assessed against the common property, and the probate court must give him credit for one-half of the amount paid, against the estate of the deceased. (Bates v. Hamilton, 407.)

COURTS.

1. COURTS—STATE AND TERRITORIAL—ADMISSION OF STATE—JURISDICTION.—Upon the admission of a territory as a state, the judgments of the territorial courts pass under the jurisdiction of the state courts of similar jurisdiction, and the latter have power to issue execution thereon, and the judges thereof have authority to institute supplementary proceedings based on such judgments. (Merchants' Nat. Bank v. Braithwaite, 653.)

2. PROBATE COURTS—JURISDICTION—TRIAL OF TITLE—SALE OF LAND OF STRANGER.—An order of a probate court for the sale of land of a third person to pay the debts of the decedent is void for want of jurisdiction over the property even if the real owners are parties and contesting the question of title. (Gjerstadengen v. Van Duzen, 679.)

3. PROBATE COURTS—JURISDICTION.—A probate court has no jurisdiction to hear and determine questions relating to the title to land. It has power to act only when the land is in fact the property of the decedent. (Gjerstadengen v. Van Dusen, 679.)

4. PROBATE COURTS—JURISDICTION—HOMESTEADS IN PUBLIC LANDS.—A federal statute exempting homesteads in public lands from liability for debts contracted before the issue of patent does not take such homestead, after it has once become the property of the homesteader, out of the jurisdiction of the probate court, in proceedings to obtain a sale of the decedent's land to pay his debts. Whether it shall be sold to pay certain debts is a judicial question to be decided by the court, and all parties interested must then and there interpose any defense to a sale which they may have, whether it relates to the existence or validity of the alleged debts, or as to whether the land can be sold because of its exemption under the statute. (Gjerstadengen v. Van Duzen, 679.)

See Contempt.

CREDITORS' SUITS.

1. CREDITORS' SUITS.—A JUDGMENT AT LAW IN THE STATE WHEREIN A CREDITOR'S SUIT IS BROUGHT is usually essential to its maintenance. (Ladd v. Judson, 267.)

2. CREDITORS' SUITS TO BREACH EQUITABLE ASSETS.—A JUDGMENT AT LAW establishing complainant's demand is an indispensable prerequisite to the maintenance of a creditors' suit, though the fund to be reached is accessible only by the aid of a court of chancery. The only exception to this rule is when the demand is of such an equitable character that a judgment at law cannot be obtained thereon. (Ladd v. Judson, 267.)

3. CREDITORS' SUITS AGAINST NONRESIDENTS.—The fact that a person against whom it is sought to maintain a creditors' suit is a nonresident of, and absent from, the state will not enable the complainant to sustain such suit without first procuring a judgment at law within this state upon his alleged demand. Notwithstanding such absence, a suit by attachment could be sustained whereby the interest of the defendant in any property within the state, subject to attachment, could be reached and a lien thus created against it. (Ladd v. Judson, 267.)

See Execution, 17.

CRIMINAL LAW.

1. CRIMINAL LAW—DECEASED WIFE'S SISTER.—THE OFFENSE OF BEGETTING AN ILLEGITIMATE CHILD ON THE BODY OF A WIFE'S SISTER cannot be committed after the decease of the wife. After such decease, the surviving husband and a sister of the deceased wife are, in contemplation of law, strangers. (Wilson v. State, 789.)

2. INSTRUCTIONS — CRIMINAL LAW. — REASONABLE DOUBT is properly defined, in an instruction, as being "an actual, substantial doubt of guilt arising from the evidence, or want of evidence, in the case." (Ferguson v. State, 512.)

3. CRIMINAL LAW—INSANITY FROM DRINK AS DEFENSE. Temporary insanity produced by the recent use of ardent spirits

on the part of an accused at the time he commits a crime is not ground for his acquittal, but may go in mitigation of his punishment. (Howard v. State, 812.)

4. CRIMINAL LAW.—AN ALIBI IS A LEGITIMATE DEFENSE, and should not be disparaged by the trial court, the sufficiency of the evidence for the purpose of establishing such defense being a question of fact for the jury. (Henry v. State, 450.)

5. CRIMINAL LAW—ALIBI—DISCREDITING.—It is error in a criminal prosecution for the trial court, by means of cautionary instructions, to discredit a particular defense, such as an alibi, or the evidence in support thereof, by stating to the jury that such defense is one "capable of being, and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance." (Henry v. State, 450.)

6. CRIMINAL LAW—ALIBI—DEFENSE OF.—PROOF OF an alibi is not required to cover the entire period within which the offense might possibly have been committed. The accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jury a reasonable doubt of his presence at the commission of the offense with which he stands charged. (Henry v. State, 450.)

See Game Laws.

CROPS.

See Chattel Mortgages, 2, 2.

CUSTOM.

1. A USAGE WHICH IS TO GOVERN A QUESTION OF RIGHT should be so certain, uniform, and notorious as probably to be known and understood by the parties as entering into their contract. (Cleveland etc. Ry. Co. v. Jenkins, 296.)

2. USAGE OR CUSTOM.—TO ESTABLISH a usage or custom, it is not sufficient to prove isolated instances. It must be positively established as a fact, and not left to be drawn as a matter of inference from transactions. (Cleveland etc. Ry. Co. v. Jenkins, 296.)

See Evidence, 4; Master and Servant, 2.

DAMAGES.

1. DAMAGES—NEGLIGENCE—WRONGFUL EMPLOYMENT AND DEATH OF MINOR.—There can be no recovery by parents for the wrongful employment of their minor son in a dangerous service, without their consent, and his consequent death, if such death was instantaneous. (Gulf, Colorado etc. Ry. Co. v. Beall, 892.)

2. DAMAGES—NEGLIGENCE—WRONGFUL EMPLOYMENT AND DEATH OF MINOR—CONTRIBUTORY NEGLIGENCE—STATUTE.—As a father's right to recover for the wrongful employment of his minor son, in a dangerous service, without his consent, and his consequent death, depends upon the statute, which imputes the contributory negligence of the deceased son to the father, it is error, where the death was instantaneous, to give instructions authorizing a recovery, whether the deceased was or was not guilty of contributory negligence. (Gulf, Colorado etc. Ry. Co. v. Beall, 892.)

3. DAMAGES—FRAUDULENT REMOVAL AND CONCEALMENT OF MORTGAGED PERSONALTY.—If, during proceedings to enforce a chattel mortgage by foreclosure and execution, a claim-

ant of the property, who gets possession thereof from the mortgagor, fraudulently removes and conceals it, thus destroying the security of the mortgagee, he is answerable in damages to the latter. (Held v. Matthews, 164.)

4. PRACTICE—RULE OF DAMAGES.—If the application of either of two conflicting rules for ascertaining damages leads to substantially the same result, the failure of the court to state which of the two rules it has adopted is harmless error and not ground for a new trial. (Gustafson v. Rustemeyer, 92.)

5. JURY TRIAL — DAMAGES — INSTRUCTIONS RESPECTING.—An instruction to a jury that in certain contingencies they should find for the plaintiff and fix his damages at such sum as they thought right, not exceeding the amount specified in the complaint, is erroneous. The verdict should be based upon evidence rather than upon what the jury think right. (Cleveland etc. Ry. Co. v. Jenkins, 296.)

6. DAMAGES—PLEADING—GENERAL ALLEGATION CONTROLLED BY SPECIFIC AVERMENTS.—If a complaint seeking to recover damages for an injury to piles states that the plaintiff was obliged to sell such piles at nine and one-half cents per foot, whereas they would have been worth fourteen cents per foot but for the wrongs complained of, and contains a general averment that by the acts complained of the plaintiff was damaged in the sum of three thousand dollars, the special averment controls, and plaintiff cannot recover any sum in excess of four and a half cents for each foot of such piles. (Kerry v. Pacific Marine Co., 65.)

See Limitations of Actions; Release; Vendor and Purchaser, 6.

DEBTOR AND CREDITOR.

1. PAYMENTS—APPLICATION OF—EVIDENCE.—A letter from a creditor to his debtor at the time when a payment is made, showing how the money has been applied, is, upon the debtor's failure to object to such application, admissible in evidence to support the contention of the creditor that the payment was intended to apply to and include a particular note. (Sweeney v. Pratt, 101.)

2. DEBTOR AND CREDITOR—EXTENDING CREDIT TO APPARENT OWNER—EFFECT OF.—One who extends credit to the apparent owner of property, relying upon false statements of ownership, acquires no fixed right in such property. (Bilocchi v. Casey-Swasey Co., 875.)

DECEIT.

See Vendor and Purchaser, 1, 4-6.

DEEDS.

1. THE FILING OF A DEED FOR RECORD IS not annulled by its subsequent unauthorized withdrawal before it is actually recorded. (Parrish v. Mahany, 715.)

2. DEED—RECORDING—FAILURE TO PAY FEES FOR IN ADVANCE.—If a county recorder is not required to demand his fees in advance, and he receives and files for record a deed without demanding such fees, it must be treated, so far as validity of the record is concerned, as if such fees had been paid. (Parrish v. Mahany, 715.)

3. DEED—WHEN DEEMED RECORDED.—Under a statute making an instrument operative as a record from the time it is filed for record, the grantee should be deemed to have discharged his duty when he has delivered the instrument properly executed and acknowledged to the recording officer, and is entitled to the same pro-

tection as if the instrument were at that moment properly recorded, and no subsequent mistake can deprive him of its operation as a recorded instrument. (*Parrish v. Mahany*, 715.)

4. DEEDS—ESCROW—WHEN POSSESSION IS IMMATERIAL. The question of possession is not material where there has been an unauthorized delivery of an escrow, or where it has been obtained fraudulently, for the reason that the parties claiming under the grantee named in the escrow cannot be protected, unless it is shown that the grantor ratified its delivery or that the depositary was the grantee's agent to procure delivery. (*Dixon v. Bristol Sav. Bank*, 193.)

5. DEEDS—ESCROW—UNAUTHORIZED DELIVERY OF.—An escrow delivered without authority, or obtained fraudulently, conveys no title either to the grantee or innocent purchasers under him. (*Dixon v. Bristol Sav. Bank*, 193.)

6. DEEDS—ESCROW OBTAINED FRAUDULENTLY PASSES NO TITLE.—If a grantor places a deed in the custody of a depositary with express instructions to him to deliver it to the grantee upon the payment, by the grantee to the grantor, of a certain note given by the former to the latter, and the grantee fraudulently procures possession of the instrument from the depositary without paying the note, the depositary being entirely innocent of any wrong or bad faith, the deed passes no title, either to the grantee, or to an innocent purchaser from him, although it may not be technically an escrow, because of a secret understanding between the grantor and the grantee that the note was never to be paid and that the instrument was never to be delivered, when there is no negligence or fraudulent design on the part of the grantor. (*Dixon v. Bristol Sav. Bank*, 193.)

7. DEEDS—ESCROW—RATIFICATION OF UNAUTHORIZED DELIVERY.—If an escrow has been improperly delivered or obtained from the depositary by fraud, the grantor may ratify the delivery. Express ratification is unnecessary, but, in its absence, injury caused by the grantor's silence, inaction, or acquiescence must be shown before a ratification of wrongful delivery can be presumed against him from the facts. (*Dixon v. Bristol Sav. Bank*, 193.)

8. DEEDS—ESCROW—UNAUTHORIZED DELIVERY—QUESTION FOR JURY.—The question of ratification, where an escrow has been improperly delivered, or has been obtained from the depositary by fraud, is one of fact for the jury, if the evidence is indefinite and inferences are to be drawn. (*Dixon v. Bristol Sav. Bank*, 193.)

9. DEEDS—ESCROW—AGENCY OF DEPOSITARY FOR BOTH PARTIES—QUESTION FOR JURY.—If the evidence is uncertain and indefinite as to whether an attorney was made the depositary of an escrow as the agent of both parties, to hold it until the performance of the condition and then to deliver it to the grantee, the question should be submitted to the jury. (*Dixon v. Bristol Sav. Bank*, 193.)

10. DEEDS—ESCROW—DEPOSITARY AS AGENT FOR BOTH PARTIES.—In a broad sense, every depositary of an escrow is the agent of both parties. For the purpose of making delivery upon the performance of the conditions, he is no less the agent of the grantee than the agent of the grantor. (*Dixon v. Bristol Sav. Bank*, 193.)

11. DEEDS—ESCROW—DEPOSITARY IS AGENT FOR BOTH PARTIES.—The delivery of a deed to an agent or attorney of the grantee employed to obtain possession of the instrument, or to make

the purchase for the grantee, is tantamount to a delivery to the grantee, provided the agency includes the very matter of obtaining the conveyance for the grantee; but, while this rule applies where the delivery is made to the agent of the grantee as such agent, it has no application to a transaction, in the nature of an escrow, where the depository is, though an agent or attorney of the grantee, yet not an agent to procure the conveyance, and the delivery is to him as the agent of both parties. (Dixon v. Bristol Sav. Bank, 193.)

12. STATUTES—DISPENSING WITH SEAL—EFFECT OF, UPON DEED.—A statute which renders it unnecessary to place a seal upon a deed merely dispenses with a formality, and does not undertake to give one executed without a seal a different status from what it would have had before if executed with a seal. A deed without a seal retains the incidents it possessed as a sealed instrument at common law. (Sanger v. Warren, 913.)

See Acknowledgment, 1-3; Evidence, 7; Notice.

DEFINITIONS.

"Breaking" in burglary. (Ferguson v. State, 512.)

Care required of bailee. (Knights v. Piella, 375.)

"Increase of hazard." (Angier v. Western Assurance Co., 685.)

"Preponderance of evidence." (Willcox v. Hines, 701.)

Reasonable doubt. (Ferguson v. State, 512.)

"Subject" of an action. (Hartzell v. Vigen, 589.)

DEVISE.

WILLS—PERPETUITIES.—A devise in remainder to the "lawful heirs" of the testator's daughter after the latter's death, of any balance remaining out of a trust fund set aside for such daughter, is void under the Connecticut statute against perpetuities. (Security Company v. Snow, 107.)

See Trusts, 1.

DISORDERLY HOUSES.

See Municipal Corporations, 2.

DIVIDENDS.

See Corporations, 10, 11; Limitations of Actions, 7.

DOWER.

See Wills, 3.

DROVER'S PASS.

See Railroad Companies, 17, 18.

EASEMENT.

See Party-walls.

EJECTMENT.

EJECTMENT—PLEADING AND PROOF—RECOVERY.—Ejectment is a possessory action, and to recover, the plaintiff must plead, and, under the general issue must prove, not only a legal estate in himself, but a present right of possession. Unless both facts are established the defendant prevails. (Wells v. Steckelberg, 529.)

See Estoppel, 5.

ELECTION OF REMEDIES.

See Actions, 2.

EQUITY.

See Trusts, 2

ESCROW.

See Deeds, 4-11.

ESTATES.

1. REMAINDERMAN AND LIFE TENANT.—NATURAL GAS. When in place, is a part of the land, and goes with the inheritance. Hence, if a company asserts a right, under a contract of lease with a life tenant, to operate a gaswell on the land owned in remainder, the contract, so far as the remaindermen are concerned, should be treated as void; but where the company entered with knowledge of two of the remaindermen, and under a grant from another, and, at great cost, erected machinery, and other improvements, there should be an equitable adjustment of the rights of the parties by first reimbursing the company for its improvements, and then allowing the remaindermen a fair royalty on any further operations of the well by the company; otherwise, it must be closed. (*Gerkins v. Kentucky Salt Co.*, 370.)

2. EQUITABLE ESTATE—PURCHASER WITHOUT NOTICE OF.—A bona fide purchaser of the legal estate will be protected against the prior equitable estate of another of which he had no notice. (*Smith v. Willard*, 313.)

See Landlord and Tenant, 11-14.

ESTOPPEL

1. ESTOPPEL BY CONDUCT ALWAYS PRESUPPOSES ERROR on one side and fault or fraud on the other. (*Sweeney v. Pratt*, 101.)

2. ESTOPPEL—MISTAKE OF LAW.—Mutual mistake as to the law, the facts being known to all of the parties without concealment or misrepresentation, furnishes no ground upon which one of the parties can invoke the doctrine of estoppel against the other. (*Gjerstadengen v. Van Duzen*, 679.)

3. ESTOPPEL BY DEED—COVENANTS ARE UNNECESSARY.—Covenants of warranty or of title are unnecessary to create an estoppel by deed. (*Wells v. Steckelberg*, 529.)

4. ESTOPPEL BY DEED—VOID CONVEYANCE.—If one assumes, in a representative capacity, to sell and convey to another the entire estate in land, he is estopped from setting up an estate therein in his own right, against the purchaser, although the sale and deed made by the vendor were void. (*Wells v. Steckelberg*, 529.)

5. ESTOPPEL BY DEED—QUITCLAIM—EJECTMENT.—If it is shown that a mother died intestate, seised of land in which her husband took an estate for life, as tenant by the curtesy, and her infant son the remainder in fee; that the father petitioned for a license to sell the land, and, by averring that it was the son's and alleging other facts from which an estate in fee in possession was inferable, and by falsely alleging that he had been appointed guardian of the son, obtained such license; that he made a sale under the license, reciting in the deed that he was guardian and reciting all of the proceedings in such manner as to make them appear valid; that the deed purported to convey the whole estate, including the father's right; that the father thereafter executed to the son a deed of quitclaim; and that the son, on reaching his majority, and during the father's lifetime, brought ejectment against the purchaser at the guardian's sale, claiming that such sale was void; the

father, and those claiming under him, are estopped from setting up his life estate against such purchaser, and the action must therefore fail. (*Wells v. Steckelberg*, 529.)

See Acknowledgment, 1; Agency, 10; Appeal, 9; Chattel Mortgages, 12; Executors and Administrators, 4; Husband and Wife, 2; Judgments, 8, 13; Private Ways, 6; Trusts, 8; Warehousemen, 4.

EVIDENCE.

1. EVIDENCE—HEARSAY—IDENTITY.—Evidence by an officer making an arrest, that he obtained from others a description of the party who committed the crime, and that it was upon the description given him by such parties that he afterward arrested the accused, is inadmissible, it being hearsay and also calculated to injure the rights of the accused. (*Mallory v. State*, 808.)

2. EVIDENCE.—THE TERM "PREPONDERANCE OF EVIDENCE" does not mean a mere numerical array of witnesses, but it means the weight, credit, and value of the aggregate evidence on either side. If, however, the witnesses are of equal fairness, candor, intelligence, and truthfulness, equally well corroborated by the remaining testimony, and are equally free from interest in the suit, then the preponderance is shown by the number of witnesses. (*Willcox v. Hines*, 761.)

3. CRIMINAL LAW—EVIDENCE OF CHARACTER.—Evidence that the accused held a position of trust at a fair salary is not proof of reputation, and is not admissible when the question of reputation is not in issue. (*Howard v. State*, 812.)

4. EVIDENCE OF TRANSACTIONS WITH WHICH THE PARTY AGAINST WHOM IT IS OFFERED is not connected is not admissible. Hence, in an action against a railway corporation for not giving an employé a clearance card on leaving its employment, evidence that other railway corporations were in the habit of giving such cards to their employés is not admissible. (*Cleveland etc. Ry. Co. v. Jenkins*, 296.)

5. EVIDENCE—DECLARATIONS IN FAVOR OF ONE'S SELF.—Where it is claimed that certain promissory notes were given by their owner to his niece in his last illness, and it is shown that they were in her possession before his death, her statements made then and immediately after his death that he gave them to her are admissible in her favor. (*Martin v. Martin*, 290.)

6. JUDICIAL NOTICE WILL BE TAKEN of the general business affairs of life and of the manner in which ordinary railway business is conducted and of the every-day practical operation of railways. (*Cleveland etc. Ry. Co. v. Jenkins*, 296.)

7. DEEDS—PAROL EVIDENCE TO SHOW CONSIDERATION.—Parol evidence is admissible to show an agreement by a grantee to allow the grantor, as part consideration for the deed, the privilege of raising a crop for his own use on the land conveyed. (*Breitenwischer v. Clough*, 372.)

8. EVIDENCE OF SUBSCRIBING WITNESSES—WHEN INDISPENSABLE.—By the rule of the common law, if there are subscribing witnesses to an instrument, its execution must be proved by them, and cannot be proved by any other witnesses, unless the inability to produce them is shown. The application of this rule is especially called for if the instrument is one which the law requires to be attested by subscribing witnesses. (*Brynjolfson v. Northwestern Elevator Co.*, 612.)

See Agency, 1, 2; Animals, 4; Assault, 3; Bailment, 4, 5; False Pretenses, 4; Forgery, 4-10; Homestead, 9, 10; Homicide, 7-14; In-

sane Persons, 8-5; Larceny, 2-4; Negotiable Instruments, 1; Private Ways, 6; Vendor and Purchaser, 7.

EXECUTIONS.

1. EXECUTION—LEAVE TO ISSUE—DISCRETION OF COURT IN REFUSING.—Under a statute providing that in all cases a judgment may be enforced or carried into execution after the lapse of five years from the date of entry by leave of the court, it has a discretion to grant or refuse such leave, and its order refusing leave will not be interfered with by the appellate court, unless abuse of its discretion is shown. (*Wheeler v. Eldred*, 20.)

2. EXECUTION.—THE LIEN OF AN EXECUTION ATTACHES to all property which the debtor owns, or which he may acquire during the life of the execution. (*Second Nat. Bank v. Gilbert*, 306.)

3. EXECUTION—LEVY OF—WHEN SUFFICIENT.—If an officer having a writ goes with it to where personal property is and informs the defendant that a levy is made thereon, and the defendant agrees to keep it until the time of the sale, and the officer thereupon indorses upon his writ that he has made a levy, a sufficient levy has been made. (*Nighbert v. Hornsby*, 736.)

4. EXECUTION—LEVY OF.—It is not indispensable that an officer charged with the service of an execution should take manual possession of the property levied upon, or should at the moment of the levy indorse his action on the writ. It is sufficient that he goes to the presence of the property with the power and purpose then and there to seize it under a valid execution, and by virtue of such writ assumes control of the property with the knowledge of the defendant, and leaves it in the latter's custody by his consent and with his promise to keep it safely until demanded for sale, notes the fact of the levy on another paper, and subsequently, in due season, makes a proper indorsement on the writ. (*Nighbert v. Hornsby*, 736.)

5. EXECUTION LEVY.—THE FAILURE TO TAKE A DELIVERY BOND on leaving with the defendant personal property levied upon under a writ against him does not vitiate the levy. (*Nighbert v. Hornsby*, 736.)

6. EXECUTION—LEVY OF, WITHOUT JUDGMENT, IS VOID. If an execution issues without a judgment, the writ is without authority of law and its levy gives no right of possession. (*Boslow v. Shenberger*, 487.)

7. EXECUTION—VALID LEVY ON CHATTELS—WHAT IS.—A levy under execution is valid if, for the time being, the property is under the control of the officer, and he openly, and in express terms, asserts his dominion over it. (*Boslow v. Shenberger*, 487.)

8. EXECUTION—VALID LEVY ON CHATTELS—ILLUSTRATION.—A levy of execution upon a team of horses is valid, if they are found in a stable, and the officer notifies the person in charge of the team that he levies thereon as the property of the defendant, and thereupon indorses the levy upon the execution, although he arranges with such person to keep the team, temporarily, and to allow no one to remove it. (*Boslow v. Shenberger*, 487.)

9. EXECUTION—INVALIDITY OF EXCESSIVE LEVY.—An excessive levy of execution is void, and a levy is excessive where it is made upon different lots of land and dwelling-houses which are worth nearly twenty times the amount of the fieri facias. (*Forbes v. Hall*, 152.)

10. EXECUTION—EXCESSIVE AND FRAUDULENT LEVY—SALE EN MASSE.—To levy upon different lots of land and dwell-

ing-houses, worth nearly twenty times the amount of the fieri facias, and to sell the same in bulk, under the levy, for one fifty-sixth of the value of the property, where it is easily capable of subdivision, is a fraud in law. Such a sale is void and conveys no title to the purchaser. (*Forbes v. Hall*, 152.)

11. EXECUTIONS — INTERESTS NOT SUBJECT TO.—An obligee in a bond for a deed who has paid no part of the purchase price of the land has no interest therein subject to execution, nor to which a judgment lien can attach. (*Sweeney v. Pratt*, 101.)

12. EXECUTION.—A STATUTE EXEMPTING THE FARMING UTENSILS and implements of husbandry of the judgment debtor, entitles him to retain as exempt a threshing outfit, necessary to enable him to carry on his farming operations, though he also uses it in threshing for others. (*Spence v. Smith*, 62.)

13. EXEMPTIONS—JUDGMENTS.—A judgment obtained for the wrongful conversion of exempt property is also exempt. (*Cleveland v. McCanna*, 670.)

14. EXEMPTIONS OF PROCEEDS OF EXEMPT PROPERTY. The proceeds of a voluntary sale of exempt personal property, designed for investment in other exempt property to take the place of that sold, are not subject to attachment or garnishment. (*Cullen v. Harris*, 880.)

15. EXECUTIONS—MORTGAGED PROPERTY, WHEN NOT SUBJECT TO.—If a mortgagee of personal property is in possession thereof under a mortgage, an execution cannot be levied thereon against the mortgagor. (*Second Nat. Bank v. Gilbert*, 306.)

16. EXECUTION—MORTGAGED PROPERTY—WHEN SUBJECT TO.—Mortgaged chattels remaining in the possession of the mortgagor are subject to levy under an execution against him. (*Second Nat. Bank v. Gilbert*, 306.)

17. EXECUTIONS.—SUPPLEMENTARY PROCEEDINGS OR CREDITORS' BILLS, though instituted during the life of a judgment, cannot continue such life beyond the statutory period. (*Merchants' Nat. Bank v. Braithwaite*, 653.)

18. EXECUTIONS—SUPPLEMENTARY PROCEEDINGS ON EXPIRED JUDGMENT.—Although proceedings supplementary to execution are instituted while a judgment is alive and valid, they fall upon the death of the judgment by limitation, and may be set aside by the defendant on motion on the ground that the judgment has expired and is no longer valid. (*Merchants' Nat. Bank v. Braithwaite*, 653.)

19. EXECUTIONS—SUPPLEMENTARY PROCEEDINGS—VACATING.—It is too late for a debtor to move to vacate all proceedings had supplementary to execution on the ground that the execution was not returned within the statutory period, when he has submitted to an examination, and the appointment of a receiver in such proceedings has already been made. (*Merchants' Nat. Bank v. Braithwaite*, 653.)

20. EXECUTION SALE—CONFIRMATION—ABSENCE OF.—Where a statute declares that on the return of any writ of execution for the satisfaction of which real property has been sold, the court must examine the proceedings of the officer, and, if satisfied that the sale has been made in conformity with the provisions of the statute, must make an order confirming the sale and directing the clerk to enter on the journal that the court is satisfied of the regularity of the sale, and an order that the officer make to the purchaser a deed of such real property, a failure to have the sale confirmed in an action at law is a mere irregularity which will not defeat the purchaser's title, if the proceedings were in all respects regular. (*Baxter v. O'Leary*, 702.)

21. EXECUTION—LIABILITY OF OFFICER FOR NOT LEVYING.—An officer failing to levy the writ on personal property in possession of the judgment debtor can discharge himself from liability to the plaintiff only by proving that the property was not subject to levy, and the burden of proof is upon such officer. (*Second Nat. Bank v. Gilbert*, 306.)

22. EXECUTION—PROCEEDINGS AGAINST A SHERIFF FOR NOT MAKING A RETURN—DEFENSE TO.—Under a statute providing that if any sheriff shall refuse or neglect to execute any writ of execution, or to return any writ to the proper court on or before the return day, he shall, on motion, be amerced in the sum of the debt, damages, and costs, with ten per cent thereon to and for the use of the plaintiff, an officer failing to return a writ may relieve himself from liability by proving that the judgment debtor had no property subject to execution during the life of the writ. (*Swenson v. Christoferson*, 712.)

See Contempt, 13-15; Homestead, 2-9; Injunction, 2; Receivers, 2

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF ADMINISTRATOR—COLLATERAL ATTACK.—If a sufficient petition for administration is presented to the proper court, and the statutory notice given, its action in appointing an administrator is valid and binding, unless revoked or set aside on appeal, and cannot be collaterally attacked. (*Bradley v. Missouri Pac. Ry. Co.*, 473.)

2. EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF ADMINISTRATOR—COLLATERAL ATTACK.—The record of the appointment of an administrator not disclosing want of jurisdiction in the court, the existence of jurisdictional facts must, in a collateral proceeding, be conclusively presumed. (*Bradley v. Missouri Pac. Ry. Co.*, 473.)

3. PROBATE SALES—PURCHASER—NOTICE.—The purchaser of land at probate or administrator's sale must see to it, at his peril, that the proceedings are legal, and that the land does in fact form part of the decedent's estate. (*Gjerstadengen v. Van Duzen*, 679.)

4. ESTOPPEL.—PURCHASER AT ADMINISTRATOR'S sale of land, the patent to which has been issued to the decedent's heirs, cannot, in an action to set aside the deed acquired under such sale, set up the doctrine of equitable estoppel against the administrator who petitioned for and made the sale, although one of such heirs, when all the facts relating to the decedent's title were matters of record and known to such purchaser, and there was no concealment or misrepresentation of law or fact. (*Gjerstadengen v. Van Duzen*, 679.)

EXEMPTIONS.

See Executions; Process, 1; Setoff, 1-3.

EXTRADITION.

See Contempt, 17.

FALSE PRETENSES.

1. FALSE PRETENSES—SWINDLING BY MEANS OF CHECK.—AN INDICTMENT for swindling by means of a check, alleging that the accused falsely represented that he had a specified amount on deposit in a certain bank subject to his order, and that he had credit at such bank for a specified additional amount, and that his check would be paid upon presentation at such bank, is sufficient to charge the crime of swindling. (*Brown v. State*, 794.)

2. FALSE PRETENSES.—SWINDLING by false pretenses may be committed by means of acts and conduct alone, without any verbal assertion or representation of a fraudulent nature. (*Brown v. State*, 794.)

3. FALSE PRETENSES—SWINDLING BY MEANS OF CHECK.—The mere fact of drawing a check on a bank in which the drawer has no money, funds, or credit, is not a fraudulent representation that he has funds or credit in such bank, and does not alone constitute the offense of swindling. (*Brown v. State*, 794.)

4. FALSE PRETENSES—SWINDLING—EVIDENCE.—Under an indictment for swindling by means of a check, evidence that the accused presented to the party swindled a certificate of deposit in one bank for a large amount, but represented that it was partnership money, and that he preferred to give his personal check upon another bank where he had a deposit and upon which he gave a check, is admissible, as is also evidence of his status with both banks. (*Brown v. State*, 794.)

FILING PAPERS.

See Deeds, 1.

FORGERY.

1. FORGERY.—WHERE THERE ARE TWO PERSONS OF THE SAME NAME, and one of them signs that name to certain notes with the intention that they shall be used in trade as the notes of the other, it is forgery. (*Beattie v. National Bank*, 818.)

2. FORGERY—ALLEGATION OF PARTNERSHIP NAMES.—In an indictment for forgery of a partnership name, it is not necessary to set out the names of the individual members of the firm or partnership, as is required as to the owners of stolen property in prosecutions for theft. Neither is it essential to aver an intent to defraud all of the partners in the firm by name. (*Howard v. State*, 812.)

3. FORGERY—INDICTMENT—ALLEGATIONS.—An indictment for forgery need not set out the purport clause nor contain an allegation that the act was done with intent to defraud some particular person. It is sufficient merely if the instrument alleged to be forged be set out by its tenor, and that the indictment contain an allegation that the instrument was made by the defendant without lawful authority, and with intent to defraud. But if the indictment contains a purport clause, and the instrument is set out by its tenor, and there is a variance between the purport and tenor clauses, it is fatal to the indictment. (*Howard v. State*, 812.)

4. FORGERY—EVIDENCE OF OTHER SIMILAR CRIMES.—On a trial for forgery, evidence is admissible to show that the accused has passed other forged instruments. (*Mallory v. State*, 808.)

5. FORGERY—EVIDENCE OF PREVIOUS CRIME.—On a trial for forgery, evidence is admissible to show that the accused has committed a similar offense, and it makes no difference where it was committed. (*Howard v. State*, 812.)

6. FORGERY—EVIDENCE OF OTHER CRIMES.—On a trial for forgery, evidence of distinct offenses of the same character committed by the accused is admissible, though not contemporaneous, nor a part of the same transaction, if it shows or tends to show that the accused had adopted the same plan to utter forged instruments in other cases as is charged by the prosecution in the case on trial. (*McGlasson v. State*, 842.)

7. FORGERY—EVIDENCE OF OTHER CRIMES.—On a trial for forgery, evidence of other contemporaneous crimes of the same

character committed by the accused is admissible, as tending to establish identity in developing the *res gestae*, or in making out the guilt of the accused by circumstances connected with the transaction, or to explain the intent with which the accused acted with respect to the matter charged against him; and when it is proposed to show systematic crime, subsequent as well as prior offenses tending to establish identity or intent are admissible in evidence, although they are not part of the same offense. (*McGlasson v. State*, 842.)

8. **FORGERY—INDICTMENT—EVIDENCE.**—If an indictment for forgery sets out the instrument alleged to be forged by its tenor alone, evidence is admissible to show that the name is fictitious, or that the signature to the instrument is that of a partnership. (*Howard v. State*, 812.)

9. **EVIDENCE—COMPARISON OF HANDWRITING.**—The rule authorizing the evidence of signatures of witnesses for comparison only goes to the extent of admitting such signatures as are proved or conceded to be genuine, and such as were executed before there was any motive to fabricate or disguise the handwriting. Hence it is not permissible to allow a prosecuting witness, in a case of forgery where his signature is alleged to be forged, and he denies such signature, to make his signature before the jury for the purpose of its being used as evidence bearing on the issue whether the signature to the alleged forged instrument is his genuine signature or not. This is true although such witness can write nothing but his name, unless it is also shown that he can only write that in one form and without any change in the letters. (*McGlasson v. State*, 842.)

10. **FORGERY—EVIDENCE TO SUPPORT ALIBI.**—If, on a trial for forgery, witnesses have testified that they saw the accused write the name upon the alleged forged instrument, and the accused has testified that he did not write such name, and he relies upon an alibi, a letter written by him to his sister before the accusation for which he is on trial, and returned to him, if sufficiently identified by him as being in his handwriting, is admissible in evidence to disprove his presence at the time and place of the passing of the instrument in question, and to show that his genuine handwriting is not the same as that indorsed on such instrument. (*Mallory v. State*, 808.)

See Negotiable Instruments, 2, 3.

FORNICATION.

See Adultery.

FRANCHISES.

See Constitutions, 3.

FRAUD.

See Insurance, 18; Judgment, 20; Trusts, 2-10.

FRAUDULENT CONVEYANCES.

1. **FRAUD—INDICIA OF.**—Where the parties to a transfer of property are near relations, clearer and more convincing proof is required of the good faith of the transaction than when they are strangers. (*Second Nat. Bank v. Beattie*, 306.)

2. **FRAUDULENT CONVEYANCES BETWEEN RELATIVES—PRESUMPTION.**—The fact that the vendor and vendee in a conveyance of real estate are relatives does not raise any presumption of fraud in the transaction in favor the creditors of the vendor. (*Fluegel v. Henschel*, 642.)

3. FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.—If a conveyance of real estate is made to one not a creditor of the grantor, and the grantee knows at the time that the grantor intends by such transfer to hinder, delay, or defraud his creditors, the mere consummation of such transfer, even though based upon full consideration, is such a participation in the fraud by the vendee as invalidates the transfer against existing creditors. (*Fluegel v. Henschel*, 642.)

4. FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.—In a conveyance of real estate to defraud creditors, knowledge on the part of the grantee of such suspicious facts and circumstances as would put a prudent man on inquiry is equivalent to knowledge of all facts that would have developed the fraudulent intent of the grantor by a reasonable pursuit of such inquiry; but no duty of inquiry devolves upon the grantee unless he is in possession of such suspicious facts or circumstances. (*Fluegel v. Henschel*, 642.)

5. FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE—FRAUDULENT PAYMENTS.—A grantee of real estate who, before full payment, receives knowledge that the conveyance was fraudulent on the part of his grantor, makes further payments at his peril, even on his note, not yet due, which his grantor holds for the unpaid balance. As to such payments the grantee is regarded as a participant in the fraud, and the conveyance may be set aside pro tanto at the suit of the grantor's creditors. (*Fluegel v. Henschel*, 642.)

6. FRAUDULENT CONVEYANCES—INNOCENT GRANTEE—PAYMENTS.—A grantee's conveyance protects him, as against the grantor's creditors, to the extent of all payments innocently made in ignorance of the fraud of his grantor, and if a decree is entered directing the sale of the land to satisfy a judgment against the grantor, it should provide that from the proceeds of the sale the grantee be first reimbursed in full for all payments made by him prior to his knowledge of the grantor's fraud. It is only as to the excess over such payments that the rights of the grantor's creditors are superior to the rights of the grantee. (*Fluegel v. Henschel*, 642.)

GAME LAWS.

CRIME—ATTEMPT TO COMMIT.—One who is hunting for prairie chickens, out of season, and with intent to shoot them, armed for that purpose, is not guilty of the attempt to kill such chickens. (*Cornwell v. Fraternal Accident Assn.*, 601.)

GAMING.

1. GAMING—STATUTE PROHIBITING—INTERSTATE COMMERCE.—A statute prohibiting all persons from engaging in the business of transmitting money to any racetrack or other place, to be there bet on any horserace, trial of speed, skill, or endurance, et cetera, whether within or without the state, and also from keeping any place in which such business is permitted or carried on, is valid and not unconstitutional as a regulation of interstate commerce as applied to the agent of a telegraph company who is engaged in such business, and transmits money to another state by telegraph to be there bet upon the result of horseraces. (*State v. Harbourne*, 126.)

2. GAMING—VIOLATION OF STATUTE PROHIBITING—EVIDENCE.—A single transmission of money by a telegraph company for betting purposes does not constitute carrying on a business, but evidence of it is admissible in connection with other evi-

dence to show the violation of a statute prohibiting such business. (State v. Harbourn, 126.)

3. GAMING—STATUTE PROHIBITING—VIOLATION OF BY TELEGRAPH COMPANY.—Under a statute prohibiting all persons from engaging in the business of transmitting money to any race-track or other place, to be there bet upon any horserace, et cetera, whether within or without the state, it is not necessary to a violation of such statute by a telegraph company that its business should relate exclusively to the transmission of money for betting purposes. It is sufficient if it engages in such business, although as an independent branch, and although its other business is legitimate telegraphing. (State v. Harbourn, 126.)

GARNISHMENT.

See Attachment.

HABEAS CORPUS.

1. CONTEMPT—HABEAS CORPUS AS A REMEDY.—If a court has jurisdiction over the subject matter, although its judgment may be erroneous, it is not void and cannot be reviewed on habeas corpus; but if the court is without jurisdiction of the subject matter or of the parties, or lacks power to make the order in the particular case, it cannot punish for contempt or disobedience of such order, and habeas corpus may be invoked to avoid such punishment. (Ex parte Tinsley, 818.)

2. WITNESSES — INCRIMINATION — PRACTICE — HABEAS CORPUS.—After a witness has objected to answering a question on the ground that such answer might tend to incriminate him, it is the duty of the court to rule upon his objection, and, if it rules against him, the correctness of the ruling is to be tested, not only by the question, but by all the surrounding facts, and if it appears therefrom that the court's decision is wrong, its action can be revised upon habeas corpus, when the witness is held in contempt for refusing to answer the question. (Ex parte Park, 835.)

See Contempt, 7, 11, 16, 17.

HIGH SEAS.

See Marriage and Divorce, 2

HIGHWAYS.

PUBLIC STREETS.—IT IS THE DUTY OF A PROPERTY OWNER WHO HAS CONSTRUCTED A GRATING IN A SIDEWALK, as long as he owns and has full possession of the premises, to use reasonable diligence, to keep the grating in repair, so that it shall be as safe as any other part of the sidewalk. (Canandaigua v. Foster, 575.)

HOMESTEAD.

1. HOMESTEADS IN PUBLIC LANDS—DEATH OF HOMESTEADER BEFORE PATENT.—If a homestead claimant to public land dies before patent therefor issues, or before a right to demand a patent has accrued, the land does not become a part of his estate. Upon his death all his rights under the homestead entry cease, and his heirs become entitled, under section 2291 of the Revised Statutes of the United States, to a patent, not because they have succeeded to his equitable interest, but because the law gives them preference, as new homesteaders, and allows them the benefit of the residence of their ancestor on the land. (Gjerstadengen v. Van Duzen, 679.)

2. HOMESTEAD.—The grantee of a homestead holds it free from claims which could not be asserted against it when it remained the property of his grantor. Hence, if a homestead is exempt from a mechanic's lien, it does not become subject thereto upon a conveyance thereof being made. (*Morgan v. Beuthein*, 733.)

3. A HOMESTEAD IS NOT SUBJECT to a mechanic's lien. (*Morgan v. Beuthein*, 733.)

4. HOMESTEAD—EXEMPTION—RIGHTS OF CREDITORS WHERE CORPUS OF ESTATE HAS BEEN ENLARGED FROM INCOME.—A creditor cannot subject to the payment of a debt due by his debtor property which the latter, as the legal representative of the beneficiaries of a homestead estate, has purchased and paid for exclusively with income derived therefrom. (*Kiser v. Dozler*, 184.)

5. HOMESTEAD—EXEMPTION—ENLARGEMENT OF CORPUS OF ESTATE.—INVESTMENTS OF THE INCOME derived from property which has been set apart as a homestead go to enlarge the corpus of the estate which produced it, and this is true although the head of the family may have contributed his labor in managing the homestead estate, thus materially increasing the amount of income which would otherwise have been realized, for a debtor cannot be forced to apply his labor to the extinguishment of his creditor's claim. (*Kiser v. Dozler*, 184.)

6. HOMESTEAD—EXEMPTION—RIGHTS OF CREDITORS WHERE CORPUS OF ESTATE HAS BEEN ENLARGED FROM INCOME.—A mere pretense that a fund coming into the hands of a debtor was derived, as income, from his management of an exempt homestead, will not suffice to defeat the rights of his creditors; nor will property be wholly exempt when purchased by the head of a family, when it appears that it was paid for by him partly with income yielded by the homestead estate and partly with means derived from another and independent source. (*Kiser v. Dozler*, 184.)

7. HOMESTEADS—EXECUTION ON PROPERTY BOUGHT WITH INCOME OF—CLAIM AS HEAD OF FAMILY—PLEADING.—If property levied upon is claimed by the defendant as the head of a family on the ground that it was purchased by him with the income of a homestead estate, the pleadings should be so framed that there may be added to the homestead what fairly belongs to it, as shown by the evidence, leaving the balance subject to levy and sale. (*Kiser v. Dozler*, 184.)

8. HOMESTEAD—EXECUTION ON PROPERTY BOUGHT WITH INCOME OF—CLAIM AS HEAD OF FAMILY.—In case of a levy upon property, which the debtor claimed as the head of a family, alleging it to have been purchased with the income of a homestead estate, the fact that the title to the property thus purchased was taken by the debtor in his individual capacity, and that he made a subsequent conveyance thereof to himself as head of his family, would not support an ordinary claim, unaided by equitable pleadings showing the rights of the beneficiaries of the homestead, for no greater interest therein than that which such beneficiaries could equitably assert would pass by such conveyance, in any event, as against creditors. (*Kiser v. Dozler*, 184.)

9. HOMESTEAD—EXECUTION ON PROPERTY BOUGHT WITH INCOME OF—CLAIM AS HEAD OF FAMILY—ERRONEOUS EXCLUSION OF EVIDENCE.—If property purchased by a defendant is levied on but is claimed by him as the head of a family and the main issue is whether or not it had been previously paid for exclusively with the income of homestead property, it is prejudicial

error to exclude notes and mortgages given to various persons by the claimant, particularly in view of his testimony that the property in question had been paid for entirely with the income of the homestead. (*Kiser v. Dozier*, 184.)

10. HOMESTEAD — EXECUTION — TRANSFER TO ONE'S SELF, AS HEAD OF FAMILY, IN FRAUD OF CREDITORS—ERRONEOUS EXCLUSION OF EVIDENCE.—If a debtor conveys property to himself as the head of a family, and it is shortly afterward levied upon by a judgment creditor, who claims that the conveyance was made with intent to hinder, delay, and defraud creditors, the debtor and defendant asserting an exemption of the property on the ground that it had been paid for exclusively with the income of a homestead estate, it is the duty of the court, in view of evidence that the property was not so paid for, to submit the issue of fraud thus presented to the jury, and a failure to do so is error. It is also error to exclude evidence of the value of the property so conveyed by the debtor to himself. (*Kiser v. Dozier*, 184.)

See Contempt, 4.

HOMICIDE.

1. HOMICIDE—MURDER IN PERPETRATION OF FELONY. To sustain a conviction of murder in the first degree, under a statute providing that any person who, while engaged in the perpetration of a felony, kills another, shall be deemed guilty of murder in the first degree, it is not essential that the killing be such as, in the absence of such statute, would amount to murder, as distinguished from manslaughter. (*Henry v. State*, 450.)

2. HOMICIDE—MURDER ATTEMPTED IN ONE STATE AND COMPLETED IN ANOTHER.—An attempt to commit a murder in another state, supposed by the guilty party to have been there successful but in reality completed in this state, though by an act not by him believed to be the consummation of his purpose, is punishable here. Otherwise stated, when a crime has been completed, the result of which is a death in this commonwealth, we can take jurisdiction of the offense. (*Jackson v. Commonwealth*, 338.)

3. HOMICIDE — MURDER—DECAPITATION—ATTEMPT TO KILL IN ANOTHER STATE—VARIANCE IN INSTRUCTIONS.—Under an indictment charging murder by cutting the throat or decapitation, the jury may, under proper instructions, consider a previous attempt to kill in another state, and by different means. There is no good reason why the motive which inspired the attempted crime in another sovereignty, and the circumstances of the attempt, should not be considered with a view of determining the character, criminal or not, of the ultimate fact which took place in this sovereignty. (*Jackson v. Commonwealth*, 338.)

4. HOMICIDE — INDICTMENT — WHEN SUFFICIENT.—It is permissible, in an indictment for murder, to charge, in the alternative, the different modes or means of committing the crime, though it would not be sufficient, in a joint indictment against two persons for murder, to charge, in the alternative, that one party or the other committed the crime. (*Jackson v. Commonwealth*, 336.)

5. HOMICIDE—JOINT INDICTMENT—WHEN SUFFICIENT. A joint indictment against two persons, Scott Jackson and Alonzo Walling, charging that they, "on the ——— day of ———, 1896, before the finding of this indictment, in the county aforesaid, did willfully, feloniously, and with malice aforethought, kill and murder Pearl Bryan by the one or the other, the said Scott Jackson or Alonzo Walling, with a knife or other sharp instrument, cutting the throat of the said Pearl Bryan, so that she did then and there

die, the other being then and there present, aiding, and abetting the same, the exact manner whereof is unknown to the grand jurors, and which did the cutting, Scott Jackson or Alonzo Walling, or which aided and abetted the same, is unknown to the jurors," charges directly and certainly that Jackson did kill and murder Pearl Bryan, first by himself cutting her throat with a knife, or secondly by aiding and abetting Walling in doing so. (Jackson v. Commonwealth, 336.)

6. HOMICIDE—INDICTMENT—ALLEGATION OF MODE AND MEANS OF DEATH.—Murder may be committed by cutting a person's throat, or by aiding and abetting another to do the cutting, and these two modes may be charged, in the alternative, in a joint indictment against two persons for committing the crime. (Jackson v. Commonwealth, 336.)

7. HOMICIDE—MURDER.—CIRCUMSTANTIAL EVIDENCE considered and held sufficient to sustain a conviction for murder. (Jackson v. Commonwealth, 338.)

8. HOMICIDE—EVIDENCE—USE AND EFFECTS OF COCAINE.—If it appears, on a trial for the murder of a woman, that cocaine was found in the stomach of the deceased, and that the accused had, previous to the death, inquired as to the effects of the drug on the system, the statement of a witness as to its use in producing abortions, and its effects upon the system, is admissible in evidence. (Jackson v. Commonwealth, 336.)

9. HOMICIDE—EVIDENCE—ACTS OF CODEFENDANT.—If one of two defendants jointly indicted for the crime of murder is separately tried, the various acts of the other party during the week preceding the commission of the crime, with which the accused on trial is shown to have been closely connected, are admissible in evidence. (Jackson v. Commonwealth, 336.)

10. HOMICIDE—EVIDENCE OF FOETUS—MOTIVE.—In a prosecution for the murder of a woman, evidence that the deceased was carrying a five months' foetus, which was probably alive up to the time of the woman's death, is competent as furnishing a motive for the killing, although no mention is made, in the indictment, of the murder of an unborn child. (Jackson v. Commonwealth, 336.)

11. HOMICIDE—MYSTERIOUS MURDER—RANGE OF EVIDENCE.—If the true solution of a mysterious murder case rests largely upon circumstances affecting, or supposed to affect, the main transaction, the evidence should be allowed to take a wide range. There must, of course, be some connection between the fact to be proved and the circumstances in support of it; yet any fact which it is necessary to introduce to explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proved. Even evidence tending to prove a distinct crime is admissible, if it shows facilities or motives for the commission of the one in question. (Jackson v. Commonwealth, 336.)

12. HOMICIDE—EVIDENCE—CONVERSATIONS IN JAIL.—If two persons are jointly charged with murder, voluntary conversations between them, while confined in jail, are admissible in evidence upon the separate trial of them. (Jackson v. Commonwealth, 336.)

13. HOMICIDE—EVIDENCE—CONVERSATION BETWEEN PARTIES CHARGED WITH CRIME.—If two persons, charged with murder, converse and make statements about the crime, in the presence of a third, the entire conversation is admissible in evidence, upon the subsequent separate trial of one of the parties,

particularly where part of such conversation would be unintelligible without the whole of it. (*Jackson v. Commonwealth*, 336.)

14. HOMICIDE—EVIDENCE—TESTIMONY OF ONE WHOSE DEPOSITION HAS BEEN TAKEN.—A witness, in a murder trial, whose deposition has been taken by the defense, and read in evidence, may be afterward introduced in person by the state. (*Jackson v. Commonwealth*, 336.)

15. HOMICIDE—INSTRUCTIONS.—Upon a trial for the murder of a girl, where the evidence tends to show that an attempt was made to kill her, by the administration of cocaine, while in a city of another state, and that this was done by the defendant, or at his instance, but that she was not thereby killed, it is proper to instruct the jury to find the defendant guilty of murder, if they believe from all the evidence, beyond a reasonable doubt, that the defendant willfully, feloniously, and with malice aforethought, himself attempted or aided, or abetted, or procured another to attempt, to kill the girl, but she was not thereby killed, and that the defendant in this county and state, before a certain date, though believing that the girl was then dead, for whatever purpose, cut her throat with a knife, or other sharp instrument, so that she did then and there, and because thereof, die. (*Jackson v. Commonwealth*, 336.)

16. HOMICIDE—INSTRUCTIONS.—Upon a trial for the murder of a girl, where it appears from the evidence that she was in a city of another state for the purpose of having an abortion performed, that her headless body was found in this state, that cocaine was found in her stomach, and that the defendant had made inquiries as to the effects of this drug on the system, it is proper to instruct the jury to find the accused guilty of murder, if they believe that he feloniously administered, or procured another to administer, drugs to the girl, for the purpose of producing an abortion, when she was so far gone with child as to make it necessarily dangerous to her life, or when the drugs were in themselves, or in the manner of their administration, dangerous to her life; and, though believing her to have been killed in this way, he cut her head off, in a designated county of this state, when she was in fact alive. (*Jackson v. Commonwealth*, 338.)

17. HOMICIDE—INSTRUCTIONS.—Upon a trial for the murder of a girl, where it appears from the evidence that she was in a city of another state for the purpose of having an abortion performed, that her headless body was found in this state, that cocaine was found in her stomach, and that the defendant had made inquiries as to the effects of this drug on the system, it is proper to instruct the jury to find the defendant guilty of manslaughter only if he cut the throat of the girl, in a designated county of this state, under the belief that she was already dead, and did so, not intending to kill her, but merely for the purpose of concealing her identity, unless he had theretofore himself attempted to kill her, or procured another to so attempt, or had administered drugs, or procured another to do so, for the purpose of procuring an abortion, in which event they should find him guilty of murder if the attempt was to kill her, or if the drugs were administered when dangerous to her life, but guilty only of manslaughter if the drugs were administered when not dangerous. (*Jackson v. Commonwealth*, 338.)

18. HOMICIDE—TRIAL—RELIEVING SHERIFF OF HIS DUTIES.—The refusal of the court, upon the separate trial of one of two defendants for murder, to relieve the sheriff of his duties in relation to the trial, and appoint another officer, upon the defendant's affidavit that the sheriff had taken an unusual interest in

procuring a conviction, that he had denounced the defendants as the guilty parties, and that he had endeavored, by threats of punishment, to force them to confess the crime, is not ground for a reversal, where it does not appear that he had any personal feeling or bias against the defendants, or that there was a failure to execute any process placed in his hands by the defendant, or to perform any other duty, and especially where the record does not show that he, or any of his deputies, summoned any juror in the case. (Jackson v. Commonwealth, 336.)

19. HOMICIDE—PUBLIC TRIAL—TICKET SYSTEM OF ADMISSION TO COURTROOM.—Prior to the commencement of a trial for murder, the defendant filed an affidavit that the sheriff had announced his intention of permitting no one to enter the courtroom during the trial except members of the bar, court officers, and those holding tickets issued by himself, and moved the court to direct the sheriff to allow all well-behaved persons to attend the trial so long as they could be accommodated, but the court refused to act on the motion, and such refusal was held not to be error, where it appeared that the ticket system was carried on, and the tickets of admission issued to those who first applied for them, for the sole purpose of preventing an overcrowded courtroom; that this was done under the eye of the trial judge; and that no friend of the defendants, or any other person, who desired to do so, was prevented from attending the trial. (Jackson v. Commonwealth, 336.)

HUSBAND AND WIFE.

1. A RESULTING TRUST IN FAVOR OF A WIFE IS PRESUMED from the purchase of property by her husband with her moneys and the taking of the title in his name. (Smith v. Willard, 313.)

2. MARRIED WOMAN—ESTOPPEL OF TO CLAIM PROPERTY AGAINST HUSBAND'S CREDITORS.—If a married woman furnishes money to her husband for the purpose of purchasing property for her, instructing him to take a conveyance in her name, and he, on the contrary, takes it to himself, which she permits to stand for seven years and without making any inquiry respecting it, she is estopped, as against his creditors, from claiming that the property is held by him in trust for her. (Smith v. Willard, 313.)

See Marriage and Divorce.

INDEPENDENT CONTRACTOR.

See Master and Servant, 4.

INDICTMENT.

See Adultery; False Pretenses, 1, 4; Forgery, 2, 3, 8; Homicide, 4-6.

INFANTS.

See Assault; Railroad Companies, 10, 12, 31.

INJUNCTION.

1. INJUNCTION—WIFE'S RIGHT TO, IN SUIT FOR DIVORCE. A wife who has been driven away from an honorable home by her husband's cruelty, who is living on her own place acquired after such separation, and who is suing her husband for a divorce on the ground of cruel treatment and of habitual intoxication, is entitled to an injunction restraining him not only from interfering with her property, but also from going into her dwelling-house and eating and sleeping therein against her protest; and the prayer for such

equitable relief may be joined with the wife's application for divorce. (*Lyon v. Lyon*, 189.)

2. INJUNCTION—VOID LEVY AND SALE UNDER EXECUTION.—If a levy of execution upon different parcels of property was void because it was excessive, and the sale thereunder was void because all of the property was sold in bulk, when it was easily capable of subdivision, the owner is entitled to an injunction to restrain the purchaser and the officer making the sale from turning him out of possession, especially where the purchaser was the attorney for the plaintiff, and bought the property for one fifty-sixth of its aggregate value. (*Forbes v. Hall*, 152.)

3. INJUNCTIONS—WHEN REFUSED.—The granting or refusal of an injunction rests in each particular case in the sound discretion of the court; and it ought not to be granted when it would be productive of great hardship, or oppression, or great public or private mischief. (*Fisk v. Hartford*, 147.)

4. INJUNCTIONS—LACHES AS BAR.—If a party is guilty of laches in applying for an injunction, he may thereby forfeit his claim to that remedy; and if, by his laches, he has made it impossible or very difficult for the court to enjoin his adversary without inflicting great injury thereby, an injunction must be refused, and the party left to his remedy at law. (*Fisk v. Hartford*, 147.)

5. INJUNCTIONS—LACHES AS BAR.—A riparian owner of a mill, who has permitted a city for many years to take its water supply in increasing quantities from the stream by means of very expensive reservoirs and distributing mains, cannot enjoin such diversion of the water; and his delay in applying for relief is not excused nor justified by the fact that until recently the city had found it convenient to return the water taken, in the form of sewage, to the stream above the mill-owner's dam. (*Fisk v. Hartford*, 147.)

INSANE PERSONS.

1. INSANE PERSONS—CONTRACTS OF—VALIDITY.—A contract by an insane person, whether executory or executed, is utterly void, even where there has been no judicial determination of the fact of insanity. (*American Trust etc. Co. v. Boone*, 167.)

2. CHECKS DRAWN BY INSANE PERSONS ARE VOID—NOTICE.—A check drawn by an insane person is void, and the bank which pays it must bear the loss, although it had no notice of the fact of insanity. (*American Trust etc. Co. v. Boone*, 167.)

3. INSANE PERSONS—CONTRACTS OF—EVIDENCE OF INSANITY.—An adjudication of insanity is merely cumulative of other evidence on the subject, and in any case where it is shown, either by a judgment of a court, or other competent evidence, that the person making the contract was insane at the time of its execution, such contract is void, although the other party thereto had no reason to suspect the existence of such insanity. (*American Trust etc. Co. v. Boone*, 167.)

4. EVIDENCE—JUDGMENT OF SISTER STATE—INSANITY.—The judgment of a court of a sister state adjudicating the question of insanity is admissible in the courts of this state as prima facie evidence upon that question. (*American Trust etc. Co. v. Boone*, 167.)

5. INSANE PERSONS—ADJUDICATION AS EVIDENCE OF INSANITY.—An adjudication by a court, whether of this state or of a sister state, having jurisdiction to determine the question, is at least prima facie evidence everywhere of the fact of insanity. (*American Trust etc. Co. v. Boone*, 167.)

See Criminal Law, 8.

See Attachment, 1.

INSTRUCTIONS.

1. JURY TRIAL—ERRONEOUS INSTRUCTIONS are not cured by merely giving others on the same subject contradicting them. This rule is especially applicable to the case of an erroneous specific direction following a correct general instruction. (*Henry v. State*, 450.)

2. INSTRUCTIONS—REFUSAL OF NOT ERROR, WHEN.—There is no error in refusing to give instructions which have already been submitted to the jury. (*Galveston etc. Ry. Co. v. Gormley*, 894.)

3. INSTRUCTIONS—CRIMINAL LAW—VAGUENESS.—The accused cannot complain of the vagueness of an instruction, where he did not request an instruction embodying his views upon the point. (*Ferguson v. State*, 512.)

4. INSTRUCTIONS—CRIMINAL LAW—FAILURE OF ACCUSED TO TESTIFY.—Under a statute providing that the neglect or refusal of the defendant, in a criminal case, to testify, shall not "create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal," it is not reversible error to instruct that: "The defendant has not testified on his own behalf in this case as he had a lawful right to do. Nothing must be taken against him because he has not so testified." (*Ferguson v. State*, 512.)

See Accounts, 2; Agency, 4; Appeal, 6-9; Assault, 1; Burglary, 3, 5, 6; Criminal Law, 5; Homicide, 3, 15-17; Insurance, 15; Larceny, 5, 6.

INTERSTATE COMMERCE.

See Constitutions, 4; Gaming, 1.

INSURANCE.

1. INSURANCE—CONSTRUCTION OF CONTRACT.—When a contract of insurance is unambiguous in its terms, it will be enforced, for courts will not so construe plain language as to make a contract embrace that which it was intended not to include. (*British America Assurance Co. v. Miller*, 901.)

2. INSURANCE—CONDITION PRECEDENT—FURNISHING MAGISTRATE'S CERTIFICATE.—A failure to comply with a provision of a policy of fire insurance that the insured, in case of loss, shall, if required, within sixty days after the fire, "furnish a certificate of the magistrate or notary public living nearest the place of fire, stating that he has examined the circumstances and believes that the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify," is no bar to a recovery thereon, as such a requirement should not be enforced. (*German-American Ins. Co. v. Norris*, 324.)

3. INSURANCE—DISCLOSURE OF PREVIOUS ATTEMPT TO BURN—DUTY OF INSURED.—It is not the duty of an applicant for fire insurance to disclose a previous attempt by some one to burn the property sought to be insured unless asked about it. (*German-American Ins. Co. v. Norris*, 324.)

4. INSURANCE—NOTICE TO AGENT IS NOTICE TO COMPANY.—If an agent of an insurance company has knowledge of a previous attempt, on the part of some one, to burn property about to be insured, notice to him of such fact is, in law, notice to the company. (*German-American Ins. Co. v. Norris*, 324.)

5. INSURANCE—DENIAL OF LIABILITY—PROOFS OF LOSS. One whose property is insured against loss by fire is not required to furnish proofs of loss, or other papers, where the company, through its general agent, denies liability on the policy and refuses to pay. (*German-American Ins. Co. v. Norris*, 324.)

6. INSURANCE—PROOFS OF LOSS—DELAY IN OBJECTING TO.—A delay for eighteen days after the receipt of proofs of loss, if unexplained in making objections thereto, is a waiver of any defects therein. (*Angier v. Western Assur. Co.*, 685.)

7. INSURANCE—PROOFS OF LOSS—WAIVER OF BY DENYING LIABILITY.—If the insurer denies his liability for a loss, he thereby waives any defects which may exist in the proofs of loss thereof submitted to him. (*Angier v. Western Assur. Co.*, 685.)

8. INSURANCE.—An increase of hazard is some alteration or change in the situation or condition of the property insured which tends to increase the risk—something of duration, and not a casual change of a temporary character. (*Angier v. Western Assur. Co.*, 685.)

9. INSURANCE—INCREASE OF HAZARD BY NEGLIGENCE IN THE USE OF KEROSENE.—A stipulation in a policy of insurance against loss by fire that it shall be void if the hazard be increased by any means within the control or knowledge of the assured, does not exempt the insurer from liability resulting from the carelessness or negligence of the assured, as where, from a careless use of kerosene in starting a fire in a stove, fire was communicated to the insured building whereby it was destroyed. (*Angier v. Western Assur. Co.*, 685.)

10. INSURANCE—LIABILITY FOR LOSS WHERE LOCATION OF PROPERTY IS CHANGED.—If personal property is insured "while contained in" a certain house, "and not elsewhere," and a loss thereof occurs at another place, the company is not answerable for it, although the insurer knew, when the policy was issued, that the insured, a judge, was in the habit, while holding court in neighboring counties, of taking such property along with him, for use in other places by his family, which accompanied him. (*British America Assurance Co. v. Miller*, 901.)

11. INSURANCE—ACCIDENT—CONSTRUCTION OF POLICIES.—When the terms of a policy permit more than one construction, that will be adopted which will support its validity, and favors the insured. (*Berliner v. Travelers' Ins. Co.*, 49.)

12. INSURANCE—ACCIDENT—INJURY WHILE RIDING ON A LOCOMOTIVE.—A condition in a policy of insurance applicable to persons riding in any passenger conveyance using steam, cable, or electricity as a motive power, applies to a person riding on the locomotive of a passenger train, and his right of recovery is the same as if riding on less dangerous parts of the train. He may, therefore, recover double the amount for which the insurer would have been liable if the injuries had been suffered elsewhere, if the policy provides for such increased recovery in favor of persons injured while riding on a passenger conveyance. (*Berliner v. Travelers' Ins. Co.*, 49.)

13. INSURANCE—ACCIDENT—HAZARDOUS OCCUPATION OR EXPOSURE.—A condition exempting the insurer from liability if the insured is injured in any occupation or exposure classed by the company as more hazardous than that here given, does not apply to individual acts, but only to employments. Hence, the fact that the insured was injured while riding on the locomotive of a passenger train, though that position is more dangerous than any involved in his regular occupation, does not relieve the insurer from liability. (*Berliner v. Travelers' Ins. Co.*, 49.)

14. INSURANCE—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.—One who is hunting for game in the ordinary manner is not guilty of voluntary exposure to unnecessary danger, so as to preclude his recovery if injured by the accidental discharge of such gun, brought about by his foot slipping while he is climbing a bank and his drawing himself up by means of a limb. (*Cornwell v. Fraternal Accident Assn.*, 601.)

15. INSURANCE—BENEFIT CERTIFICATE—QUALIFIED ANSWERS—ERRONEOUS INSTRUCTION.—If a benefit certificate is granted upon condition that the statements in the application therefor are true, and the applicant states in his application, which is made a part of the certificate, that he was fifty-four years of age at his last birthday, to the best of his "knowledge and belief," it is error, where suit is brought upon the policy, to charge that, if the applicant was materially older, when he made the application, than he represented himself therein to be, "the policy issued to him upon the faith of such representation would be void, because such representation was a material warranty." The qualification as to "knowledge and belief" should be called to the attention of the jury. (*O'Connell v. Supreme Conclave*, 159.)

16. INSURANCE—BENEFIT CERTIFICATE—QUALIFIED ANSWERS—KNOWLEDGE OF FALSITY, WHEN MATERIAL.—If an application for insurance in a mutual benefit society, and which is made a part of the benefit certificate, states that the applicant was fifty-four years of age at his last birthday, to the best of his "knowledge and belief," and suit is brought upon the policy, it is material whether or not the applicant knew his statement to be false, and a recovery cannot be defeated without showing that the applicant knew, or had reason to believe, that he was over fifty-four years old when the application was made. (*O'Connell v. Supreme Conclave*, 159.)

17. INSURANCE—BENEFIT CERTIFICATE—GOOD FAITH OF QUALIFIED ANSWERS SHOULD BE SUBMITTED TO JURY.—If the applicant for insurance in a benefit society gives his age according to the best of his "knowledge and belief," and a recovery is sought upon the policy, the application being made a part thereof, his good faith in answering should be submitted to the jury. If the answer was made in good faith, the applicant believing it to be true from his best knowledge upon the subject, then the plaintiff would be entitled to recover as against the plea of the falsity of the answer; but if, on the contrary, the answer did not state the matter thereof truly, and intentionally did not state it truly to his best knowledge and belief, then the plaintiff would not be entitled to recover as against such plea. (*O'Connell v. Supreme Conclave*, 159.)

18. INSURANCE—BENEFIT CERTIFICATE—FRAUD—PLEADING AND BURDEN OF PROOF.—The party alleging fraud must prove it. Hence, if the defendant, in a suit upon a benefit certificate, alleges fraud, on the part of the applicant, in answering as to his age, the burden is upon the insurer to prove that the applicant made false and fraudulent representations regarding his age, for the purpose of inducing the defendant to issue him the certificate. (*O'Connell v. Supreme Conclave*, 159.)

19. INSURANCE—BENEFIT CERTIFICATE—QUALIFIED STATEMENTS AS CONDITIONS PRECEDENT—PROOF OF TRUTH.—If statements in an application for a benefit certificate are qualified as being true to the best of the applicant's "knowledge and belief," such statements are conditions precedent, the truth of which the plaintiff must prove before he can recover. (*O'Connell v. Supreme Conclave*, 159.)

20. INSURANCE—BENEFIT CERTIFICATE—RELATION OF POLICY TO APPLICATION—MATTERS OF DEFENSE.—In making a prima facie case for recovery upon a benefit certificate, the action is to be treated as founded on so much of the contract as is set forth in the policy, leaving stipulations, warranties, and conditions expressed only in the application to be brought to the notice of the court defensively by the society. (*O'Connell v. Supreme Conclave*, 159.)

21. INSURANCE—BENEFIT SOCIETIES—RELATION OF SUBORDINATE LODGE AND SUPREME CONCLAVE—ASSESSMENT.—Whether the act of an officer of a subordinate lodge of a given order is, in a particular instance, binding upon the "supreme conclave" of the same order depends upon the relation of the former to the latter, as defined by its constitution and by-laws, and upon what is therein provided. Hence, in the absence of necessary information on these points, it cannot be intelligently determined whether or not the payment of an assessment to an officer of the subordinate lodge would, in legal contemplation, be a payment to the "supreme conclave." (*O'Connell v. Supreme Conclave*, 159.)

JOINT LIABILITY.

See Shipping, 4, 5.

JUDGES.

1. JUDGES — WHEN DISQUALIFIED.—A judge who is the owner of real property taxable for the payment of a bonded indebtedness, the validity of which is in question in the suit, and which property, if such validity is maintained in such suit, will be subject to special taxes for a period of years directly affecting the value of all property subject thereto, is interested in such suit, and hence disqualified to sit or to act therein under a statute prohibiting any judge from acting in a suit wherein he is interested. (*Meyer v. San Diego*, 22.)

2. A JUDGE IS DISQUALIFIED when he has in the litigation some certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered. (*Meyer v. San Diego*, 22.)

JUDGMENTS.

1. JUDGMENTS RENDERED DURING VACATION of courts are void, unless expressly authorized by statute. (*Ex parte Ellis*, 831.)

2. JUDGMENTS—PRESUMPTIONS.—The judgment appearing upon the record is presumptively the judgment of the court, and not an error of the clerk, and it is also presumed that the record correctly states the date of the judgment. (*Missouri etc. Ry. Co. v. Holschlag*, 417.)

3. A JUDGMENT CREDITOR, BEFORE THE FILING OF A DEED FOR RECORD, occupies the position of a purchaser under the statutes of Illinois, and will acquire title as against such deed by sale of the property under execution, though notice of the deed is given to him prior to the sale. (*Smith v. Willard*, 313.)

4. JUDGMENT—LIEN OF, ATTACHES WHEN.—STATUTE.—The statute of Nebraska makes a judgment, not rendered by confession, and not rendered at the same term of court at which the action is brought, a lien upon the lands of the judgment debtor from the first day of the term of court at which the judgment is rendered, and parties dealing with real estate are charged with notice

of pending suits against their grantor in the district courts of the county where the land is situate. (*Ocobock v. Baker*, 519.)

5. JUDGMENT AND MORTGAGE LIENS ATTACH WHEN—PRIORITY.—If a term of court begins on a certain date, during which a judgment is rendered, not by confession, in an action commenced prior to such date, and during the term, but before the rendition of the judgment, the judgment debtor mortgages a portion of his real estate, the lien of the judgment attaches, under the statute of Nebraska, against the real estate of the judgment debtor, from and after the first day of such term of court; and the lien of the judgment is prior to the lien of the mortgage, though the latter is filed for record prior to the date of the rendition of the judgment. (*Ocobock v. Baker*, 519.)

6. JURISDICTION—CONSTRUCTIVE SERVICE OF PROCESS, WHETHER ATTACHMENT MUST PRECEDE.—It is not necessary, to support a judgment based upon constructive service of process, that any attachment should have been levied before the publication of summons was made. It is sufficient that such levy preceded the entry of the judgment. (*Hartzell v. Vigen*, 589.)

7. JURISDICTION—GARNISHMENT AND CONSTRUCTIVE SERVICE OF PROCESS.—If a garnishment is levied before the entry of judgment, though no property is taken possession of thereunder by the officer, this is sufficient to support a judgment entered upon constructive service of process against a nonresident, if the garnishee has, before judgment, made a disclosure stating that he holds a number of promissory notes belonging to the defendant. The court thereby acquires jurisdiction to make all orders necessary to realize from the defendant's interest in the property. (*Hartzell v. Vigen*, 589.)

8. JUDGMENTS BY DEFAULT—ESTOPPEL.—A judgment by default based upon a petition alleging a good cause of action establishes the truth of all the allegations of the petition, except those relating to value and amount of damage; and estops the defendant, in another action between the same parties, from claiming that such judgment was based on perjured testimony. (*Slater v. Skirving*, 444.)

9. RES JUDICATA.—If suit to have a judgment set aside on the ground of fraud has been decided against the defendant, a demurrer, in a collateral proceeding, to his defense, setting up the same fraud, is properly sustained. (*Bates v. Hamilton*, 407.)

10. JUDGMENTS—RES JUDICATA.—A judgment in a prior action between the same parties operates in a second action between them upon a different claim or demand, as an estoppel only as to those matters in issue or points controverted upon the determination of which the findings or verdict was rendered. (*Slater v. Skirving*, 444.)

11. JUDGMENTS—RES JUDICATA.—A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose. (*Slater v. Skirving*, 444.)

12. JUDGMENT—RES JUDICATA—DECISION OF STATE COURT OVERRULED IN FEDERAL COURT.—If the highest court of a state decides that the purchase of a lottery franchise, by authority of the legislature, creates a contract that cannot, under the federal constitution, be revoked, but this decision is virtually overruled by the supreme court of the United States, the subject of the

alleged contract right, when brought into question by subsequent litigation, is not *res judicata*. (*Commonwealth v. Douglass*, 328.)

13. JUDGMENTS—RES JUDICATA—EVIDENCE OF ISSUES.—In order that a judgment in one action shall operate as an estoppel in another, between the same parties, it must be made to appear, not only that there was a substantial identity of issues, but also that the issue as to which the estoppel is pleaded was actually determined in the former action; and where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit. The burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence, if necessary. Evidence is not admissible in such case to contradict the record. (*Slater v. Skirving*, 444.)

14. JUDGMENTS—RES JUDICATA—WHERE THERE ARE SEVERAL ISSUES.—If in one action, the plaintiff alleges several facts, the proof of any of which entitles him to a recovery, and there is a general finding against him, it must be conclusively presumed in another action between the same parties founded upon the same facts that each fact so averred was determined against such plaintiff, whether or not any evidence was offered in the former case in support of each of such facts. (*Slater v. Skirving*, 444.)

15. JUDGMENTS—ENTRY NUNC PRO TUNC.—Entry of a judgment, *nunc pro tunc*, can be made only upon evidence furnished by the papers and files in the cause or something of record, or in the minute-book or judge's docket as a basis to amend by. (*Missouri etc. Ry. Co. v. Holschlag*, 417.)

16. JUDGMENTS—ENTRY NUNC PRO TUNC.—Written opinions by judges of trial courts are not required nor provided for by law. Such an opinion is not a paper in the case constituting a part of the record, and an entry thereon by the clerk of the date it was filed with him is not evidence of the date that the judgment was rendered, upon which an entry *nunc pro tunc* can be based. (*Missouri etc. Ry. Co. v. Holschlag*, 417.)

17. JUDGMENT—ENTRY NUNC PRO TUNC—TIME—NOTICE.—A court is invested with authority to make its records disclose what actually transpired. Hence, if, in any proceeding pending in a court, a judgment is actually pronounced or an order actually made, and if, for any reason, such judgment or order is not recorded, then, at any time afterward, upon proper notice being given to the parties interested and the facts being established that such judgment was pronounced or such order made, the court may cause such order or judgment to be spread upon its records as of the date it was pronounced or made. (*Hyde v. Michelson*, 533.)

18. JUDGMENT—ENTRY NUNC PRO TUNC—TIME.—A code section providing that an action to vacate or modify a judgment rendered must be brought within three years after such judgment is pronounced has no application to a proceeding brought to obtain a *nunc pro tunc* entry of a judgment, and such entry may, therefore, be made more than three years after the actual rendition of the judgment. (*Hyde v. Michelson*, 533.)

19. JUDGMENT—ENTRY NUNC PRO TUNC—RIGHTS OF THIRD PARTIES.—A party to an action cannot prevent the court from entering, *nunc pro tunc*, the judgment pronounced by it, by showing that a third person, not a party to the action, has acquired an interest in the property involved in the litigation since the rendition of the judgment. The rights of such third person, where he is not before the court, are not adjudicated in the *nunc pro tunc* proceeding. (*Hyde v. Michelson*, 533.)

20. JUDGMENTS—VAOATING FOR FRAUD.—In order to set aside a judgment alleged to have been obtained by fraud, it must

appear that fraud was practiced in the very act of obtaining it. The fact that the judgment was based on a deed afterward found to be a forgery, is not sufficient to vacate it for fraud, unless that defense was prevented by fraud at the time that the judgment was obtained. (Bates v. Hamilton, 407.)

21. JUDGMENT—LIABILITY FOR ACTS DONE AFTER PAYMENT OF.—If a judgment is paid by a surety of one of the defendants, and thereafter he and others seize and sell property in pretended satisfaction of it, their acts constitute a naked trespass, for which all are jointly and severally liable. (March v. Barnet, 44.)

See Contempt, 7; Insane Persons, 4, 5; Receivers, 1; Setoff.

JUDICIAL NOTICE

See Evidence, 6

JURISDICTION.

JURISDICTION—REMOVAL AND REMANDING OF CAUSE—APPEAL.—The federal courts are the exclusive judges of their own jurisdiction. Hence the action of a circuit court of the United States in remanding a cause removed thereto from a district court of the state is conclusive; and the action of the state court in then taking jurisdiction is not reviewable on appeal. (Western Union Tel. Co. v. Luck, 869.)

See Contempt, 4-6, 11, 16; Courts, 1, 3, 4; Homicide, 2; Judgment, 6, 7; Municipal Corporations, 1.

JURY TRIAL.

See Trial.

LACHES.

See Injunction, 4, 5; Mortgage, 10.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT.—THE RULE OF CAVEAT EMPTOR as between landlord and tenant applies only so far as the rights of the parties rest upon contract, or when the tenant has an opportunity to examine the premises, and the defect is so obvious and the danger so apparent that he can see them by using ordinary care and diligence. (Willcox v. Hines, 770.)

2. LANDLORD AND TENANT—CONTRACT TO REPAIR.—One not a party to a lease cannot recover of the landlord for injuries received because of his breach of a covenant to repair. (Willcox v. Hines, 761.)

3. A LANDLORD IS ANSWERABLE TO A MEMBER of the lessee's family for injuries received from the defective condition of the leased premises independently of any covenant in the lease, if the landlord knew, or by the exercise of reasonable care might have known, of the dangerous and unsafe condition of the premises, and the person injured, without being guilty of contributory negligence on his part, was without such knowledge. (Willcox v. Hines, 761.)

4. LANDLORD AND TENANT—DUTY OF UPON THE LEASING A PART ONLY OF THE PREMISES.—Where, after constructing a grating in a sidewalk, the owner leases part only of the premises, as where he leases the lower story and retains possession of the upper he still owes to the public and to the municipality the implied duty to use reasonable care in inspecting and

repairing the grating, though the tenant has, by implication, the exclusive right to use it. (*Canandaigua v. Foster*, 575.)

5. LANDLORD AND TENANT—NEGLIGENCE—NOTICE OF CONDITION OF PREMISES.—Evidence that a landlord's agent knew of the dangerous condition of the premises, that the landlord promised to repair them, and that he sent a carpenter to make such repairs, is sufficient to charge him with notice of the condition of the premises and to fix upon him a liability for such condition. (*Willcox v. Hines*, 761.)

6. LANDLORD AND TENANT—LIABILITY FOR DANGEROUS CONDITION OF PREMISES.—If a landlord, seeing that the leased premises are in a dangerous condition, agrees to send some one to repair them and put them in a safe condition, and he sends one who leaves them unsafe, in consequence of which a person is injured such landlord is answerable therefor. (*Willcox v. Hines*, 761.)

7. LANDLORD AND TENANT—LIABILITY FOR DEFECTIVE CONDITION OF PREMISES, FOUNDED UPON NEGLIGENCE.—There is a liability not founded upon contract existing against a landlord for his negligence or wrong in leasing dangerous premises, for which a tenant or other occupant may recover if injured, when the defect is of a hidden character known to the landlord and not disclosed to the tenant or other occupant. (*Willcox v. Hines*, 770.)

8. LANDLORD AND TENANT—HIDDEN DEFECTS—LIABILITY OF LANDLORD FOR.—A landlord is answerable to his tenant for injuries received by the latter from hidden defects in the leased premises existing at the date of the lease of which he was ignorant and of which the landlord knew, or might have known, had he exercised reasonable care and diligence. This liability does not rest upon contract or warranty, but on the obligation implied by law that the landlord will not expose the tenant or the public to danger, of which he knows, or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence. (*Willcox v. Hines*, 770.)

9. A LANDLORD IS LIABLE FOR SUCH DEFECTS and dangers as were in existence when the lease was made, provided he knew of them, or ought to have known of them, and provided also that the tenant did not know of them and could not know of them, both parties exercising reasonable care and diligence. (*Willcox v. Hines*, 770.)

10. LANDLORD—WHEN BOUND BY STATEMENTS OF HIS EMPLOYEES.—If a landlord sends a carpenter to repair premises, and the latter, after making some repairs, assures an occupant that they are safe, his statement is admissible against the landlord. (*Willcox v. Hines*, 761.)

11. LANDLORD AND TENANT—DEATH OF TENANT FOR LIFE—RIGHTS OF HIS LESSEE.—The death of a life tenant terminates the lease of the premises between him and his lessee, and the lessee may at once surrender the possession discharged of any liability to the reversioner for rent thereafter accruing. (*Guthmann v. Vallery*, 475.)

12. LANDLORD AND TENANT.—THE LESSEE OF A TENANT FOR LIFE is bound to take notice of the extent of his landlord's title, and on the termination of the life estate he becomes a tenant at sufferance. (*Guthmann v. Vallery*, 475.)

13. LANDLORD AND TENANT—LESSEE FROM TENANT FOR LIFE—LIABILITY FOR RENTS.—A lessee from a tenant for life, who remains in possession of the premises after the termination

of the life estate without any contract with the reversioner or protest or objection from him, becomes liable to the latter for the reasonable value of the use and occupation of the premises, but not liable on his contract with the tenant for life. (*Guthmann v. Vallery*, 475.)

14. LANDLORD AND TENANT—LESSEE FROM TENANT FOR LIFE—RIGHT OF REVERSIONER TO RENTS.—If the lessee of a tenant for life remains in possession after the termination of the life estate without any contract with the reversioner, and pays the full amount of rent reserved in the lease to the administrator of the tenant for life, the reversioner has no claim against the estate of the life tenant for the rent thus paid, and the administrator of such estate, though he has converted such money to his own use, or the use of another, is not liable to the reversioner therefor. (*Guthmann v. Vallery*, 475.)

LARCENY.

1. LARCENY—WHAT CONSTITUTES—TAKING BY FEAR INDUCED BY THREATS.—To constitute larceny, the taking must be not only felonious, but without the consent of the owner; but a felonious taking with the consent of the owner, when the giving of such consent is not a voluntary act, but is the result of actual fear induced by threats calculated to excite a reasonable apprehension of bodily injury, is a taking without the owner's consent and a larceny, and whether such apprehension of danger existed, and, if so, whether it was a reasonable apprehension, are questions of fact, and must be determined in each particular case, by the language of the menaces of the accused, his actions, and the circumstances surrounding the person who thus parts with his property. (*State v. Kallaher*, 116.)

2. EVIDENCE OF OWNERSHIP.—On a trial for theft, where it is proved on the part of the prosecution that, at the time of the sale of the animal alleged to have been stolen, the accused stated that it belonged to him, he is entitled to prove that a woman claimed the ownership of, and authorized him to sell, the animal, that she was proposing to sell it to others, and that after he sold it she proposed to refund the money. These facts are admissible, whether the accused has testified or not, or whether the statements of the woman were made before or after the taking by the accused. (*Kimball v. State*, 799.)

3. LARCENY—EVIDENCE OF THREATS.—Threats by a person accused of larceny to bring a civil suit against a house owner and attach all of his property, uttered in connection with a threat to burn his house with its inmates, are admissible in connection with and as introductory to such other threat, although they are not by themselves a ground for a charge of larceny. (*State v. Kallaher*, 116.)

4. LARCENY—EVIDENCE OF FEAR INDUCED BY THREATS. In a prosecution for larceny, evidence that the accused threatened to burn a dwelling-house with its inmates unless the owner thereof immediately complied with his demand for money, is admissible as tending to show that such owner parted with his money under a reasonable fear, induced by such threats of immediate bodily injury to himself and his family. (*State v. Kallaher*, 116.)

5. LARCENY.—INSTRUCTIONS. In a prosecution for larceny, that the crime of larceny is included in the crime of robbery, but that, in the opinion of the court, the proof in the case at bar would not admit of a conviction for robbery, though irrelevant and erroneous, are not ground for reversal unless prejudicial to the accused. (*State v. Kallaher*, 116.)

repairing the grating, though the tenant has, by implication, the exclusive right to use it. (*Canandalgua v. Foster*, 575.)

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6. LARCENY—INTENT—INSTRUCTIONS.—If the possession of the property of another, to which the taker has no claim, is obtained openly, but by deception, artifice, or fraud designed by the taker to secure the possession of such property which is subsequently converted to the use of such taker, the jury is justified in finding that the taking was with a felonious intent, and that larceny was committed, if that and the other facts in the case are sufficient to constitute the crime, and an instruction to that effect is proper. (*State v. Kallaher*, 116.)

See Bailment, 1; Burglary, 6.

LICENSE.

See Private Ways, 2, 8.

LIENS.

1. LIENS — DESCRIPTION—CONSTRUCTION OF.—A writing purporting to create a lien on all the estate of a party thereto must be so construed as to comprehend all that part of his property susceptible of being impressed with a lien, by a writing of that purport, executed and recorded in the manner in which it was. (*Higgins v. Higgins*, 57.)

2. LIENS — GENERALITY OF DESCRIPTION IN INSTRUMENTS CREATING.—A writing purporting to create a lien on all the estate of one of the parties thereto during his life is not invalid for want of definiteness of description; and if such writing is acknowledged and recorded in the manner required for instruments affecting the title to real property, all subsequent purchasers and encumbrancers of property of that class hold their interests subject thereto. (*Higgins v. Higgins*, 57.)

See Chattel Mortgages, 2; Executions, 2, 11; Judgment, 4, 5; Marriage and Divorce, 8; Mechanics' Liens; Mortgage, 1; Warehousemen, 2, 8.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS—SHORTENING TIME WITHIN WHICH TO BRING ACTIONS.—The time within which to bring an action may be lessened by statute, as to existing causes of action, provided the suitor has still a reasonable time, after the law is passed, in which to commence his suit, and, upon the failure of the statute to fix such time, the court is to decide what is a reasonable time, which is to be computed from the day when such law was passed, and not from the time it took effect. (*Merchant's Nat. Bank v. Braithwaite*, 653.)

2. ACTIONS—SHORTENING TIME WITHIN WHICH TO COMMENCE.—It is not essential to the validity of a law shortening the time within which actions may be brought that it shall, as to existing causes of action, fix a certain time after its enactment within which such actions must be enforced, provided the time actually left in which to sue is not unreasonable. (*Merchant's Nat. Bank v. Braithwaite*, 653.)

3. LIMITATIONS OF ACTIONS—EXTENDING TIME BY NEGLECTING TO MAKE DEMAND.—A creditor cannot, by neglecting to make a demand, extend the time allowed by law in which to sue his debtor. (*Winchester etc. Turnpike Co. v. Wickliffe*, 356.)

4. LIMITATIONS OF ACTIONS—WHEN THE STATUTE BEGINS TO RUN.—The statute of limitations begins to run from the time that the debtor is subject to be sued, or from the time that the creditor can, by his own act, or of his own volition, become

entitled to maintain an action. (Winchester etc. Turnpike Co. v. Wickliffe, 356.)

5. LIMITATIONS OF ACTIONS—CAUSE OF ACTION ACCRUES, WHEN.—The statute of limitations does not begin to run until the cause of action accrues; but this means that, whenever it is in the power of the creditor to enforce the payment of his demand, his cause of action has accrued, although he may, by law, be required to make a demand before he involves the debtor in a bill of costs. (Winchester etc. Turnpike Co. v. Wickliffe, 356.)

6. MECHANIC'S LIEN.—THE STATUTE OF LIMITATIONS begins to run against a mechanic's lien from the time that such lien is filed. (Pardue v. Missouri Pac. Ry. Co., 489.)

7. LIMITATIONS OF ACTIONS—DIVIDENDS DECLARED BY A CORPORATION—FIFTEEN YEARS.—An action upon a contract or obligation in writing is not, under the statute of Kentucky, barred until fifteen years from the time the cause of action accrued. Hence, an action upon a declaration of dividends by a corporation, it being part of the records of the company, when signed by the proper officer, and, therefore, an obligation in writing for the payment of money, is not barred, under that statute, until fifteen years from the time the cause of action accrued. (Winchester etc. Turnpike Co. v. Wickliffe, 356.)

8. DAMAGES—FRAUDULENT REMOVAL AND CONCEALMENT OF MORTGAGED PERSONALTY—STATUTE OF LIMITATIONS.—A chattel mortgagee's right of action for damages against one who fraudulently removes and conceals the mortgaged property, during proceedings to enforce the mortgage by foreclosure and execution, thus destroying the mortgagee's security, accrues at the time of such act, and the statute of limitations then begins to run; but if the fraudulent intent was not apparent at the time of such act, the statute does not begin to run until after the mortgagee, by the use of due diligence, could have discovered the fraud. (Reid v. Matthews, 164.)

See Adverse Possession, 1.

LOTTERIES.

LOTTERY PRIVILEGE — GRANT OF — LEGISLATIVE POWER TO REPEAL—IMPAIRING OBLIGATION OF CONTRACTS.—While a legislature may, in the exercise of its police power, grant a lottery privilege, the grant is only a privilege or license, not contractual, and a subsequent legislature may, in the interest of good order and morals, revoke the privilege thus granted and repeal the grant, although pecuniary interests have been acquired under and by authority of the grant. (Commonwealth v. Douglass, 328.)

See Constitutions, 3; Police Power, 4.

MALICIOUS PROSECUTION.

1. FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION without probable cause, the plaintiff is answerable to the defendant, though the latter was not arrested nor his property rights interfered with in any manner. Statutes awarding costs to the successful litigant do not abridge his right to recover for such a malicious prosecution. (Kolka v. Jones, 615.)

2. FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION the plaintiff is not liable if he had probable cause for believing his action could be brought. (Kolka v. Jones, 615.)

3. PROBABLE CAUSE IS A QUESTION OF LAW, if the facts are not disputed; otherwise, it is a question of fact for the jury to determine. (Kolka v. Jones, 615.)

4. **MALICE MAY BE INFERRED** from the prosecution of a civil action without probable cause. (Kolka v. Jones, 615.)

5. **MALICIOUS PROSECUTION.—THE MALICE NECESSARY** to sustain an action for malicious prosecution need not be ill-will toward the defendant, but may be any unjustifiable motive. (Kolka v. Jones, 615.)

6. **MALICIOUS PROSECUTION.—IF A CIVIL ACTION IS BROUGHT** by a person knowing the claim sued on has been satisfied, he cannot justify his conduct, and is answerable for malicious prosecution. (Kolka v. Jones, 615.)

7. **MALICIOUS PROSECUTION OF CIVIL ACTION.—LEGAL MALICE IS MADE OUT** by showing that an action was instituted from any improper or wrongful motive, and it is not necessary that actual malevolence or corrupt design be shown. What is done willfully and purposely, if it be at the same time known to the doer to be wrong and unlawful, is, in legal contemplation, malicious. (Kolka v. Jones, 615.)

8. **MALICIOUS PROSECUTION—EVIDENCE OF PROBABLE CAUSE.—The voluntary dismissal** of a suit is prima facie evidence of want of probable cause for its institution. (Kolka v. Jones, 615.)

9. **MALICIOUS PROSECUTION OF CIVIL ACTION.—Attorneys' fees**, to the extent that they are reasonable and necessary, may be recovered in an action for the malicious prosecution of a civil action. (Kolka v. Jones, 615.)

MANDAMUS.

1. **MANDAMUS UNDER THE COMMON LAW** issued in the king's name to inferior courts, officers, corporations, or persons, but not to the king himself, to parliament, nor to the judiciary, except to such inferior courts as the higher court has power to review. (People v. Morton, 547.)

2. **MANDAMUS NEVER ISSUES TO THE EXECUTIVE OR LEGISLATIVE BRANCH OF THE GOVERNMENT** nor to the judicial branch having final jurisdiction. (People v. Morton, 547.)

3. **MANDAMUS MAY BE ENFORCED ONLY** by the commitment, as for contempt, of the person who refuses to obey, and hence will not be issued against one whom the courts have not power to commit and imprison. (People v. Morton, 547.)

4. **MANDAMUS WILL NOT ISSUE AGAINST THE GOVERNOR OF THE STATE** to compel him to perform any duty devolving upon him by virtue of his office, though it is a duty which the legislature might have committed to another officer. Hence, the writ will not issue to him as a member of the board of trustees of public buildings. (People v. Morton, 547.)

5. **MANDAMUS MAY ISSUE TO THE LIEUTENANT GOVERNOR, AND TO THE SPEAKER OF THE ASSEMBLY** during the recess of the legislature, for during such recess they are not exempt from arrest and imprisonment. (People v. Morton, 547.)

6. **MANDAMUS AGAINST SUCCESSOR IN OFFICE.—If an officer** refuses to perform an official duty, and an alternative writ of mandate issues against him, after which his term of office expires, the writ cannot issue against his successor, where the delinquency charged was personal and did not involve a claim prosecuted against the state, in which it alone was interested. Where the delinquency charged is personal, the petition for the writ abates upon the death, resignation, or expiration of term of office of the official charged, unless it is preserved by statute. (People v. Morton, 547.)

MARRIAGE AND DIVORCE.

1. FOR A VALID MARRIAGE the laws of California require a solemnization in the mode and by the persons specified in its Civil Code. (Norman v. Norman, 74.)

2. MARRIAGE ON THE HIGH SEAS—WHEN VOID.—A marriage on the high seas must be judged by the law of the state of the domicile of the parties, and if not supported thereby is void. There is no law in force on the high seas, unless it be that of the domicile of the parties controlling or authorizing marriage. (Norman v. Norman, 74.)

3. A LIEN ON ALL HUSBAND'S LAND OWNED BY HIM DURING LIFE, is created by a provision in an agreement of separation entered into in writing between him and his wife, stipulating for the payment to her of six hundred dollars annually, and that the payment of such sum shall be a continuing obligation, to constitute a lien upon his estate during his lifetime, and after his death, during the life of his wife. (Higgins v. Higgins, 57.)

See Injunction, 1; Wills, 4, 5.

MARRIED WOMEN.

See Acknowledgment, 1-3.

MASTER AND SERVANT.

1. MASTER AND SERVANT—RELATION OF RESPONDEAT SUPERIOR—WHEN DOES NOT EXIST BETWEEN.—If a contractor engaged in repairing a building, in which there is an elevator, calls upon an employé of the owner of the building, whose general duty it is to manage and operate such elevator, to assist him in doing the work of such contractor by using such elevator as a movable platform, an employé of the contractor, working upon such elevator and using it as such platform, and injured by the negligence of such employé of the owner of the building in managing such elevator, cannot recover of such owner therefor, because at the time such employé is not engaged in the work of his employer, but in that of such contractor. (Higgins v. Western Union Tel. Co., 537.)

2. MASTER AND SERVANT.—THE DOCTRINE OF RESPONDEAT SUPERIOR APPLIES ONLY when the relation of master and servant exist in respect to the very transaction in question. Hence, it is not necessarily inferable respecting a transaction from the fact that one person is in the alleged employment of another. Servants who are employed and paid by one person may, nevertheless, be ad hoc the servants of another in the particular transaction, and that, too, when their original employer is interested in the work. (Higgins v. Western Union Tel. Co., 537.)

3. MASTER AND SERVANT.—WHEN A SERVANT OF ONE PERSON IS LOANED TO ANOTHER, or, for any reason, undertakes to do work for another, he becomes the servant of that other, and his master is not answerable for his negligence while so in the service of the other. (Higgins v. Western Union Tel. Co., 537.)

4. FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR HIS EMPLOYER IS NOT ANSWERABLE, though the work which he is engaged to do is of a character which, if not carefully done, will probably inflict damage upon others, as where he is to blast rock adjacent to the premises or building of another, but the work contracted to be done is lawful, does not constitute a public nuisance, and there is no statute binding the employer to efficiently perform it. (Berg v. Parsons, 542.)

5. MASTER AND SERVANT.—THE NEGLIGENCE OF A SERVANT WHEN NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT is not attributable to his master. (*Higgins v. Western Union Tel. Co.*, 537.)

6. MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE PLACE FOR SERVANT.—The general rule requiring the master to exercise reasonable care to provide for his servant a reasonably safe place in which to do his work is not ordinarily applicable to cases where the master neither has nor assumes possession, use, or control, legal or actual, of the premises or place where the servant may be at work. (*Channon v. Sanford Co.*, 133.)

7. MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE PLACE FOR SERVANT.—The general rule requiring the master to use reasonable care to provide a reasonably safe place for the servant to work in does not apply to those cases of frequent occurrence in which it is the duty of the servant, by force of the nature of his employment, to make the staging, scaffolding, or similar structure upon which he does his work reasonably safe for his own use. (*Channon v. Sanford Co.*, 133.)

8. MASTER AND SERVANT—DUTY OF MASTER TO FURNISH SAFE PLACE FOR SERVANT ON PREMISES OF ANOTHER.—If a master sends his servant to work upon the premises of a third person at the request of the latter, the master is not liable to the servant for the unsafe condition of such premises, nor is he required to care for the safety of the servant while upon such premises, in the absence of an express agreement to that effect. (*Channon v. Sanford Co.*, 133.)

9. EMPLOYER AND EMPLOYEE.—THE DUTY OF GIVING A CLEARANCE CARD or letter of recommendation to an employé discharged or quitting the service of the employer was not imposed by the common law, and does exist in the absence of any statute or contract creating it or a well-settled usage or custom on the part of the employer to grant such cards or letters. (*Cleveland etc. Ry. Co. v. Jenkins*, 296.)

MECHANIC'S LIEN.

1. MECHANIC'S LIEN—BUILDING CONTRACT—LIEN FOR DAMAGES.—A statute which confers a lien for labor performed or materials furnished for the erection of structures does not confer a lien thereon for damages caused by a breach of contract to erect them. (*Pardue v. Missouri Pac. Ry. Co.*, 489.)

2. MECHANIC'S LIEN—BUILDING CONTRACT—LIEN FOR DAMAGES.—If a person contracts to construct an elevator, but is wrongfully interrupted by the owner before the work is completed, and is thereby prevented from completing it, the contractor is entitled to a lien for the value of all labor which he has performed and materials which he has furnished, but is not entitled to a lien for the damages occasioned by the breach of the contract. (*Pardue v. Missouri Pac. Ry. Co.*, 489.)

See Homestead, 2, 3; Limitations of Actions, 6.

MINES AND MINING.

1. PETROLEUM, OR COAL OIL, IS A MINERAL, and hence does not pass to the grantee under a deed reserving all mines, metals, and minerals. (*Murray v. Allred*, 740.)

2. NATURAL GAS IS A MINERAL, and, therefore, does not pass by a conveyance of land reserving all mines and metals. (*Murray v. Allred*, 740.)

3. A CONVEYANCE RESERVING TO THE GRANTOR ALL MINES, MINERALS, AND METALS in and under the land does

not pass to the grantee any natural gas or coal or petroleum oils constituting a part of such land. (Murray v. Allred, 740.)

See Adverse Possession, 8, 4.

MISTAKE.

See Estoppel, 2.

MORTGAGE.

1. MORTGAGE AND JUDGMENT—REGISTRATION—CONSTRUCTIVE NOTICE—PRIORITY.—The registry laws apply to subsequent purchasers and encumbrancers only. Hence, if a judgment lien, by force of the statute, attaches in favor of a bank from and after the first day of the term at which it is rendered, though a mortgage on the property is filed for record after such day and before the judgment is actually rendered, the bank is a prior encumbrancer, and the record of the mortgage is not, therefore, constructive notice to the bank of the existence of the mortgage, for the bank is not charged with constructive notice of deeds or mortgages, affecting the real estate upon which its judgment is a lien, and which are filed for record subsequent to such first day of the term. (Ocobock v. Baker, 519.)

2. MORTGAGES—ASSUMPTION OF MORTGAGE DEBT.—A mortgagee cannot recover upon an agreement to assume the mortgage debt inserted in a deed to a remote grantee of the premises, when the grantor in such deed purchased the premises subject to the mortgage, but did not agree to pay, and was not liable for, such debt. (Hicks v. Hamilton, 431.)

3. MORTGAGES—ASSUMPTION OF MORTGAGE DEBT.—Unless the grantor is personally liable for a mortgage debt on the premises granted, the mere promise of the grantee to assume and pay such debt is a nudum pactum, without efficacy in favor of either the grantor or the mortgagee. (Hicks v. Hamilton, 431.)

4. MORTGAGES—ASSUMPTION OF MORTGAGE DEBT BY GRANTEE—FORECLOSURE.—A grantee of mortgaged premises whose conveyance recites that the land is conveyed subject to the mortgage, and that the grantee assumes and agrees to pay such debt as part of the consideration, is not liable for a deficiency arising upon a foreclosure and sale, unless his grantor was liable, legally or equitably, for the payment of the mortgage. (Hicks v. Hamilton, 431.)

5. A MORTGAGEE CANNOT ACQUIRE TITLE TO THE MORTGAGED PREMISES by purchasing them at a tax sale. If he does make such purchase, either in his own name or that of another, the mortgagor has the right to treat it as a payment and to compel the canceling of the certificate of sale on refunding the money paid, with interest. (Stinson v. Conn. Mut. Life Ins. Co., 262.)

6. MORTGAGE—REDEMPTION FROM TAX SALE BY THE MORTGAGEE.—If a mortgagee has procured an assignment of a tax certificate, and has presented such certificate with a claim to recover the amount paid therefor with interest, the mortgagor cannot effect a redemption through the county clerk's office, and thus cut off the mortgagee's right to interest. (Stinson v. Conn. Mut. Life Ins. Co., 262.)

7. MORTGAGES—APPORTIONMENT OF DEBT.—An oral offer by the mortgagee at an auction sale of the premises mortgaged to let certain sums remain on each parcel of the tract sold, does not constitute an apportionment of the mortgage debt. Such offer, unless accepted, amounts to nothing, and if accepted could only

be made effectual by future conveyances between the parties. (Brooks v. Benham, 87.)

8. MORTGAGES.—APPORTIONMENT OF MORTGAGE ENCUMBRANCES made between the mortgagee and purchasers of certain parcels of the mortgaged premises cannot affect purchasers of other parcels of the same tract who were not consulted and gave no consent. (Brooks v. Benham, 87.)

9. MORTGAGE OF SEVERAL PARCELS SOLD TO DIFFERENT PURCHASERS—APPORTIONMENT OF DEBT.—A mortgagee of several parcels of land, which together are worth more than the amount of his debt and are subsequently sold by the owner of the equity of redemption, at the same time to different persons, cannot release his security as to any parcel in such manner as to increase the burden on the rest. He has no right, without the consent of all, to bargain with any of these purchasers for the release of his parcel on payment of less than its fair share of the whole debt. The mortgagee, therefore, releases at his peril if he has notice of the conveyances out of which the equities in question arise, and if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the receipt of such share in favor of the remaining parcels. (Brooks v. Benham, 87.)

10. MORTGAGES—SUBROGATION OF MORTGAGEE TO LIEN OF JUDGMENT CREDITOR—LACHES.—If the lien of a judgment is prior to the lien of a mortgage, and the judgment is a lien upon lands not covered by the mortgage, the mortgagee is not entitled to be subrogated to the judgment creditor's lien against the land covered by the mortgage where the judgment creditor, with notice of the existence of the mortgage, releases from the lien of his judgment lands not covered by the mortgage of value sufficient to satisfy his judgment, but was, at no time prior to such release, notified by the mortgagee that he would be required or expected to collect his judgment from the lands of the debtor upon which the mortgage was not a lien. The mortgagee's right to subrogation, in such a case, is forfeited by his laches. (Ocobock v. Baker, 519.)

11. MORTGAGE—ENCUMBRANCE ON INFINITESIMAL PART OF THE PROPERTY—MORTGAGEE'S RIGHT TO REMOVE.—If a mortgagor covenants in his mortgage to pay all taxes, assessments, and other charges on the property, and to remove all adverse claims, clouds, and encumbrances thereon, and a sale for taxes is subsequently made of the east vigintillionth of the property, the mortgagee has the right to have the cloud created by the sale removed, and hence may redeem from it and charge the amount necessarily expended in so doing to the mortgagor, and enforce repayment out of the mortgaged premises. (Stinson v. Conn. Mut. Life Ins. Co., 262.)

12. MORTGAGES—SATISFACTION OF—WHAT IS NOT.—A mortgage debt is never satisfied by the mere acceptance of a conveyance of the equity of redemption as to part of the security. (Brooks v. Benham, 87.)

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—JURISDICTION OF PERSONS.—The legislature may give a city jurisdiction of a person who comes within its limits, but, even in the absence of express legislative authority, municipal ordinances have the same effect upon persons who come within the city limits as they have upon regular inhabitants. (Morris v. Columbus, 243.)

2. MUNICIPAL CORPORATIONS—UNREASONABLE ORDINANCES—DISORDERLY HOUSES.—A municipal ordinance pro-

viding that no person shall "permit drunkards, intoxicated persons, tipplers, gamblers, persons having the reputation or name of being prostitutes, or other disorderly persons to congregate, assemble, visit, or remain in his or her house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business," is unreasonable and beyond the power of the city authorities to enact, "under a charter conferring authority to prevent vice and immorality, preserve public peace, and good order, prohibit and suppress the keeping of houses of ill-fame and assignation, or for the resort of common prostitutes, or disorderly houses," for the reason that it is not limited in its application to places requiring police regulation, nor to assemblages of immoral persons, and does not make knowledge of the reputation of the persons visiting a house or place of business, or an unlawful purpose on the part of the visitor, an ingredient of the offense. (*Grand Rapids v. Newton*, 387.)

3. NEGLIGENCE—CONTRIBUTORY.—A city, though guilty of negligence in leaving one side of a sidewalk unguarded by a rail, is not liable for an injury to a pedestrian familiar with the situation, caused by his own mistake, without which he would not have been injured, in walking off the unguarded side of the walk. (*Church v. Howard City*, 396.)

4. NEGLIGENCE — CONTRIBUTORY — PEDESTRIAN ON SIDEWALK.—A person perfectly familiar with the situation, and knowing the danger, who is injured while passing along a sidewalk on a dark night by falling into an excavation from the side of the walk unguarded by a rail, is guilty of negligence, and cannot recover if he contributes to his injury by making a mistake and following a false light instead of the one he is accustomed to follow, instead of guiding himself by the rail on the opposite side of the walk. (*Church v. Howard City*, 396.)

5. MUNICIPAL CORPORATIONS — POND — NEGLIGENCE CAUSING DEATH—LIABILITY OF CITY.—A city is not answerable for the death of a child from drowning in a pond situated on private property, not in dangerous proximity to a public highway, although the city may have created the pond by overflowing the property without objection from the owner. In such a case, the city owes no duty to the general public, aside from that of a sanitary character, other than such as devolves upon the owner of the real property submerged. (*Omaha v. Bowman*, 506.)

6. MUNICIPAL CORPORATIONS—ACTION FOR NEGLIGENTLY CAUSING DEATH—ERRONEOUS INSTRUCTIONS.—If a city overflows lots without objection from the owner, creating a pond thereon, but not in dangerous proximity to a public highway, and a child is accidentally drowned therein, it is error, in an action to recover against the city for the death, to give instructions which assume that the city could be held liable, if the evidence proves an injury, caused by the massing of the water on the lots, which would entitle the lotowners to damages. (*Omaha v. Bowman*, 506.)

NAMES.

NAMES.—THE LAW DOES NOT REGARD A MIDDLE INITIAL LETTER as part of a person's name, but only recognizes the christian name of the party. (*Beattie v. National Bank*, 318.)

See Forgery, 1.

NATURAL GAS.

See Estates, 1; Mines and Mining, 2, 3.

NEGLIGENCE.

1. NEGLIGENCE—DEGREE OF CARE—HOW FIXED.—The degree of care is fixed by the relations of the parties, as master and

servant or carrier and passenger, but the quantum of vigilance to be exercised must be determined by the circumstances; more care must be used whenever there is greater danger. (*Galveston etc. Ry. Co. v. Gormley*, 894.)

2. NEGLIGENCE WHERE NO DUTY IS IMPOSED.—In cases where no duty is imposed, the question of negligence is not reached, for negligence can, in law, only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby. (*Dobbins v. Missouri etc. Ry. Co.*, 856.)

3. NEGLIGENCE—EVIDENCE—PROXIMATE CAUSE OF INJURY.—Negligence is a fact to be shown by evidence. Its existence cannot be left to mere conjecture, and it must be the proximate cause of the injury of which complaint is made. (*Omaha v. Bowman*, 506.)

4. CONFLICT OF LAWS—NEGLIGENCE.—The law of Canada governs the liability of a corporation engaged in constructing a tunnel between Michigan and Canada for an injury to its employé sent by the foreman in Michigan from that side to the Canadian side or end of the tunnel to work in compressed air at a higher pressure than he was accustomed to work in, when the action is based on an alleged wrong in putting him at dangerous work without warning him of the increased danger and while he was in ignorance of such danger, known or which should have been known to the master. (*Turner v. St. Clair Tunnel Co.*, 397.)

See Damages, 1, 2; Landlord and Tenant, 5, 7; Master and Servant; Municipal Corporations, 3-6; Railroad Companies; Telegraph Companies, 3, 8.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS.—THE POSSESSION OF AN UNINDORSED NOTE made payable to a third person is prima facie evidence of ownership in the holder. This evidence is not rebutted by proof that the consideration for such note was furnished by such third person and that it was originally his property. (*Martin v. Martin*, 290.)

2. NEGOTIABLE INSTRUMENTS.—A FORGED INDORSEMENT OF COMMERCIAL PAPER, THOUGH BY A PERSON HAVING THE SAME NAME AS THE PAYEE, does not pass any title nor justify a payment to the indorser. (*Beattie v. National Bank*, 318.)

3. NEGOTIABLE INSTRUMENTS—INDORSEMENT BY A PERSON OF THE SAME NAME AS THE PAYEE.—Where a bill is payable to the order of a person, and another of the same name obtains possession of it and indorses it to a third person in good faith and for value, the latter acquires no title. (*Beattie v. National Bank*, 318.)

4. SUBROGATION—MAKER AND INDORSER.—If the property of the maker of a note is attached in an action against him and his indorser, and an undertaking is thereupon given for the release of such property, conditioned that the sureties will pay any judgment which may be recovered against such maker, they cannot, on paying the judgment, be subrogated to any right not possessed by their principal. Hence they cannot take an assignment of the judgment and enforce it against such indorser. (*March v. Barnett*, 44.)

See Evidence, 5.

NEW TRIAL.

NEW TRIAL—NO ABUSE OF DISCRETION IN DENYING, WHEN.—There is no abuse of discretion in refusing to grant a new

trial where the evidence, though conflicting, warranted the verdict. (O'Brien v. Spalding, 202.)

See Appeal, 13, 15.

NONSUIT.

See Trial, 4.

NOTICE.

1. NOTICE—PURCHASER WHERE THE SAME GRANTOR HAS MADE TWO CONVEYANCES AT DIFFERENT PERIODS, BOTH OF WHICH ARE OF RECORD.—A purchaser is bound to examine the records to discover whether the grantor therein had made any conveyance prior in point of time, but junior in record to that under which he claims. (Parrish v. Mahany, 715.)

2. NOTICE.—WHERE THE SAME GRANTOR HAS MADE TWO CONVEYANCES of the same property, both of which are recorded, but the one last made was first recorded, a purchaser from the grantee in the deed junior in point of execution, but prior in recordation, is chargeable with notice of both conveyances, and must inquire whether he whose conveyance was first recorded was a purchaser in good faith and for a valuable consideration. (Parrish v. Mahany, 715.)

See Acknowledgment, 1; Agency, 7; Attorney and Client; Fraudulent Conveyances, 3, 4; Insurance, 4; Mortgage, 1.

OFFICERS.

1. OFFICERS DE FACTO—COLLATERAL ATTACK.—The validity of the official acts of a de facto officer cannot be collaterally attacked. (Cleveland v. McCanna, 670.)

2. AN OFFICIAL BOND WITH A PENALTY IN EXCESS OF THAT PRESCRIBED BY STATUTE, voluntarily given, may be enforced to the whole amount thereof, where the statute declares that no official bond shall be void for want of compliance with the statute, but shall be valid for the matters therein contained. (State v. Taylor, 707.)

See Executions, 21.

OUSTER.

See Cotenancy, 1.

PARENT AND CHILD.

See Damages, 1, 2.

PARTITION.

See Cotenancy.

PARTNERSHIP.

See Forgery, 2, 8; Suretyship.

PARTY-WALLS.

PARTY-WALLS—DESTRUCTION AND REPAIRING OF.—If a party-wall exists between two buildings, with an easement in favor of one of the buildings to use a stairway and doorway

through a party-wall, and the buildings and wall are destroyed by fire, and the parties thereupon reconstruct the buildings and wall, the easement to maintain the stairway and to have and use the door is thereby revived. (Douglas v. Coonley, 580.)

PAYMENT.

See Vendor and Purchaser, 2.

PEDIGREE.

See Animals, 4, 5.

PERPETUITIES.

See Devise.

PETROLEUM.

See Mines and Mining, 1, 3.

PHYSICIANS AND SURGEONS.

See Witnesses, 8, 9.

PLEADING.

1. PRACTICE.—WHEN A DEMURRER IS INTERPOSED TO AN ANSWER, all the allegations of the complaint and all new matters stated in the answer must be treated as true. (Douglas v. Coonley, 580.)

2. PRACTICE—MISJOINDER—WAIVER OF.—A contention by a number of defendants that "the demurrer should have been sustained as to these respondents" is merely an attack upon the ground that the facts stated in the complaint do not constitute a cause of action against them, and does not present the question whether they were improperly joined with another defendant. (March v. Barnett, 44.)

See Corporations, 2; Damages, 6; Ejectment.

POLICE PENSIONS.

See Statutes, 2, 3.

POLICE POWER.

1. POLICE POWER—RESTRAINT OF LIBERTY.—DANGER TO PUBLIC HEALTH is a sufficient ground for the exercise of the police power in restraint of a person's liberty. (Morris v. Columbus, 243.)

2. VACCINATION—AUTHORITY TO COMPEL—POLICE POWER.—The legislature has power to pass an act compelling vaccination, and, whenever an epidemic of smallpox is existing, or may be reasonably apprehended, it may, in the exercise of its police power, confer upon a municipal corporation authority to make and enforce ordinances requiring all persons who come within its limits to submit to vaccination. (Morris v. Columbus, 243.)

3. VACCINATION—WISDOM OR POLICY OF LAWS AS TO—COURTS DO NOT DEAL WITH.—The courts have nothing to do with the wisdom or policy of a law requiring persons to submit to vaccination. (Morris v. Columbus, 243.)

4. POLICE POWER—STATE CANNOT BARTER AWAY—LOTTERY PRIVILEGE.—The state cannot sell, barter, or contract its police power away. Hence, if the state grants a lottery privilege which is an exercise of its police power, and then authorizes its sale the purchaser takes the privilege subject to the right of the state

to repeal it, for the state cannot sell or barter away its control of the subject. (Commonwealth v. Douglass, 328.)

See Lotteries.

PRESUMPTIONS.

See Appeal, 2, 11; Banks, 6; Corporations, 2; Executors and Administrators, 2; Fraudulent Conveyances, 2; Judgment, 2, 14; Vendor and Purchaser, 3.

PRIVATE WAYS.

1. **WAYS—RIGHTS OF OWNER.**—The owner of a right of way may do whatever is reasonably necessary to make it suitable and convenient for his use, but he is not entitled to use another way merely because the entrance to his established way has become useless, owing to a lawful change in the grade of the public highway. His remedy is to lower and alter the level of such entrance and of his way to correspond with the new grade of the highway. (Nichols v. Peck, 122.)

2. **WAYS—NONUSER—IMPLIED LICENSE.**—The right of passage through a certain barway, as part of a right of way gained by prescription, is not lost by a failure to use it for eleven years after it becomes impassable by act of the public authorities, and the use of another barway, some distance removed, under an implied license from the owner. (Nichols v. Peck, 122.)

3. **WAYS—REVOCAION OF IMPLIED LICENSE.**—Changing and locking a gate is a sufficient revocation of an implied license to use it arising from the owner's acquiescence for eleven years in its use by one who has a right of way across the premises at another point. (Nichols v. Peck, 122.)

4. **WAYS—DEVIATION BY PAROL.**—A way by prescription, which runs in a defined course to a fixed point, is no more subject to deviation by a parol agreement or by acts and conduct than if it had been created and so described by deed. (Nichols v. Peck, 122.)

5. **WAYS—DEVIATION.**—A way joining a highway through a certain gate cannot be regarded in law as substantially identical with a way joining it through another gate seventy feet distant. (Nichols v. Peck, 122.)

6. **WAYS—EVIDENCE—ESTOPPEL.**—An answer in the negative by one when asked if he has "a regular right of way" over land, without being informed of the purpose of the inquiry, and with no intention of misleading a purchaser, does not thereby estop him from claiming that he has a right of way over the land gained by prescription, as against such purchaser of the land who has not relied upon such statement. (Nichols v. Peck, 122.)

See Adverse Possession, 2; Railroad Companies, 6.

PRIVILEGED COMMUNICATIONS.

See Attorney and Client, 1-4; Witnesses, 8; Wills, 8, 9.

PROBATE COURTS.

See Courts.

PROCESS.

1. **PROCESS—EXEMPTION FROM SERVICE OF.**—All suitors and witnesses who are nonresidents of a state or county in which a case is being tried are exempt from service of civil process during their attendance in good faith before any judicial tribunal therein,

and for a reasonable time in going to and returning therefrom. (Hicks v. Besuchet, 665.)

2. PRACTICE.—A STATUTE REQUIRING AN AFFIDAVIT FOR THE PUBLICATION OF SUMMONS, to show that the court has jurisdiction of the subject of the action, is satisfied by an affidavit, stating that the court has jurisdiction of the action. (Hartnell v. Vigen, 589.)

PUBLIC LANDS.

See Homestead, 1.

PUNISHMENT.

See Contempt, 10.

RAILROAD COMPANIES.

1. RAILWAYS—DUTY RESPECTING.—It is the duty of a railway company to have a good, substantial, and sufficient track for the use of its trains, and to see that they are properly managed. If a passenger is injured by a neglect of this duty, the company is guilty of negligence for which it is answerable. (Illinois Cent. R. R. Co. v. Beebe, 253.)

2. A RAILWAY IS NOT UNDER ANY OBLIGATION to give employes discharged or leaving its employment a clearance card or letter of recommendation, though it is necessary to enable them to obtain employment elsewhere. (Cleveland etc. Ry. Co. v. Jenkins, 296.)

3. RAILROAD COMPANIES—DUTY TO TRANSPORT CARS OF OTHER ROADS.—Railroads, as common carriers, must receive and transport the cars of other roads when tendered under proper conditions and when the gauge is suitable and the cars offered are not defective, out of repair, or of such construction in whole or in any particular as to be unreasonably dangerous to those who are obliged to work on or handle them. (Chicago etc. R. R. Co. v. Curtis, 456.)

4. A STREET RAILWAY SHOULD HAVE sufficient employes on its cars to operate them in a careful manner, so as to prevent injury to persons and animals that may go upon the track, and it is answerable for damages resulting from its failure to do so. It is for the jury to determine from all the circumstances whether the operation of a street-car by one employe only, who must perform the duties both of motorman and of conductor, is negligent. (Citizens' Rapid Transit Co. v. Dew, 754.)

5. NEGLIGENCE.—A CONTRACT UNDERTAKING TO EXEMPT A RAILWAY COMPANY from liability, except for gross negligence, is void when sought to be applied to the liability of the company while engaged in the carriage of a person accompanying livestock shipped by him, as he must be regarded as a passenger for hire. (Illinois Cent. R. R. Co. v. Beebe, 253.)

6. RAILWAY—RIGHT OF WAY.—Occupancy of its right of way by a railroad corporation for the purposes of a water tank, when necessary, is proper, and the owner of land which is subject to a right of way cannot object thereto. (Railroad v. French, 752.)

7. RAILROADS—INTERFERING WITH DRAINAGE—CONSTRUCTION OF STATUTE.—A statute, the object of which is to prevent a railroad company from unnecessarily interfering with the natural drainage of the land on either side of its right of way, does not require the company to prevent the accumulation of water in excavations made, from time to time, on its right of way. (Dobbins v. Missouri etc. Ry. Co., 856.)

8. NEGLIGENCE—DUTIES AND RIGHTS AT THE INTERSECTION OF A RAILWAY AND A PUBLIC HIGHWAY.—A person attempting to use a public street and employes in charge of a railway train rightfully therein must each exercise his right with a proper reference to the rights of the other, but an interference by one with the other in the exercise of his right does not confer upon the other the right to disregard the proper mode of using the street. The right to do an act does not include the right to do it carelessly. (Studer v. Southern Pac. Co., 39.)

9. RAILROADS—CROSSINGS—DUTY TO LOOK AND LISTEN.—A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing, as well as of sight, and, if either sense cannot be rendered available, the obligation to use the other is stronger, to ascertain, before attempting to cross, whether a train is in dangerous proximity, and if he neglects to do this and ventures blindly upon the track without any effort to ascertain whether a train is approaching, it must be at his own risk, and he cannot recover for an injury thus received. (Phillips v. Detroit etc. Ry. Co., 392.)

10. NEGLIGENCE, AS A MATTER OF LAW, must be inferred from an attempt to pass between the cars of a train which is liable to move at any instant, without taking any precaution to avoid danger. This rule applies to a child twelve years of age. (Studer v. Southern Pac. Co., 39.)

11. NEGLIGENCE—CONTRIBUTORY.—Though a railway train improperly blocks a street, or remains standing therein for an unreasonable time, a person is not, for that reason, authorized to incur unnecessary risk in seeking to cross the street, but is still required to exercise such prudence as would ordinarily be required of one seeking to pass between the cars of a standing train which is liable to move at any moment. (Studer v. Southern Pac. Co., 39.)

12. NEGLIGENCE.—A CHILD TWELVE YEARS OF AGE is guilty of negligence in attempting to pass between the cars of a train standing on a public street; for a child is required to exercise the same degree of care which children of his age ordinarily exercise, and a court is authorized to determine what this degree of care is. (Studer v. Southern Pac. Co., 39.)

13. NEGLIGENCE—PROXIMATE CAUSE.—The failure of a person in charge of a train of cars standing on a public street to give notice that it is about to move is not the proximate cause of injury to a person attempting to pass between such cars; and, if injured, he cannot recover because of such failure, for he is himself not free from fault or negligence. (Studer v. Southern Pac. Co., 39.)

14. RAILROADS — CROSSINGS — CONTRIBUTORY NEGLIGENCE BY DEAF PERSON.—A deaf man who drives upon a railway track at a crossing without stopping to look for an approaching train is guilty of negligence barring a recovery, and his contributory negligence is not excused by the fact that his view of the track is obstructed, if he could have seen it by standing up in his buggy, although another vehicle had crossed in safety some distance ahead of him, and although it was not usual to a train to pass on that particular day or at that hour. (Phillips v. Detroit etc. Ry. Co., 392.)

15. RAILWAYS—CARE TO BE EXERCISED BY PASSENGERS.—An intelligent passenger upon a railway train, then in motion, cannot omit to use his senses and assume there is no cause to be prudent and vigilant. While he may rely upon the performance by the railway company of all its duties to him, this does not relieve him from the duty of using his own senses of sight, hearing, and perception. (Piper v. New York Central etc. R. R. Co., 560.)

16. RAILWAYS—NEGLIGENCE OF PASSENGER IN WALKING OUT OF A VESTIBULE TRAIN.—If a passenger on a vestibule train undertakes to enter a closet, and the train is plunged into darkness by passing through a tunnel, and he opens the door, thinking it leads to the closet, but it opens out of the vestibule, and he is thrown out and injured, he is guilty of contributory negligence, precluding his recovery. The darkness called upon him to use special prudence, and, neglecting to proceed cautiously, he must accept the consequences of his undue precipitation. (*Piper v. New York Central etc. R. R. Co.*, 560.)

17. RAILWAYS.—ONE RIDING ON A DROVER'S PASS in the charge of livestock shipped by him is a passenger for hire, and as such entitled to recover if injured through the negligence of a railway corporation or its employes. (*Illinois Cent. R. R. Co. v. Beebe*, 253.)

18. RAILWAYS.—A shipper of livestock injured while riding in a car with it, through the negligence of a railway company may recover therefor, though his contract required him to ride in the caboose, if it also provided for him to feed, water, and take care, at his own expense and risk, of such stock, and he was in the car, caring for his stock, in order to fulfill this obligation. (*Illinois Cent. R. R. Co. v. Beebe*, 253.)

19. RAILWAYS—PASSENGER ON FREIGHT TRAIN—INJURIES TO BY SUDDEN STARTING.—If a passenger lawfully upon a freight train rises, when the train is at a standstill, for the purpose of alighting or of feeding stock thereon, when his contract with the company requires him to do so, and he is injured by a sudden starting or an unusual jerking, or jumping of the train, a jury is justified in finding the company to have been guilty of negligence, if the passenger is shown to have been in the exercise of ordinary care. (*Illinois Cent. R. R. Co. v. Beebe*, 253.)

20. RAILROADS—NEGLIGENCE—STRUCTURES AND APPLIANCES—ORDINARY CARE.—A railroad company is required to use ordinary care to furnish structures and appliances which are reasonably safe, and to use such care to maintain them in that condition. (*Galveston etc. Ry. Co. v. Gormley*, 894.)

21. RAILROAD COMPANIES—COUPLINGS—RISK ASSUMED BY EMPLOYES.—If a car belonging to a connecting carrier is equipped with double buffers, that fact is open, apparent, and obvious. An experienced brakeman who attempts to make a coupling with such car assumes the risks attendant thereon, although the cars in general use on the railroad where he is employed and where he attempts to make the coupling are equipped with single buffers. (*Chicago etc. R. R. Co. v. Curtis*, 456.)

22. RAILROADS—EMPLOYÉS—NEGLIGENCE—DEGREE OF CARE—ERRONEOUS INSTRUCTION.—In an action against a railroad company to recover damages for an injury to an employé, alleged to have been caused by the company's negligence, it is error to instruct the jury that "the degree of care of all parties is higher when the lives and limbs of themselves or others are endangered than in ordinary cases." (*Galveston etc. Ry. Co. v. Gormley*, 894.)

23. RAILROADS—EMPLOYÉS—NEGLIGENCE—DEGREE OF CARE—QUANTUM OF DILIGENCE.—The law imposes upon a railway company the exercise of ordinary care to provide for each and all employes, machinery, roadbed, and appliances reasonably safe, and to exercise like care to maintain them in that condition; but the degree of care does not vary with the increase or diminution of danger. It continues to be ordinary in degree, though the quantum of diligence to be used differs under different conditions. (*Galveston etc. Ry. Co. v. Gormley*, 894.)

24. RAILROAD COMPANIES—NEGLIGENCE—BUFFERS.—It is not negligence for a railroad company to receive and transport the cars of another company which are equipped with double buffers, while its own cars are equipped with single buffers. (Chicago etc. R. R. Co. v. Curtis, 456.)

25. RAILROADS—EMPLOYEES AND STRUCTURES—ORDINARY CARE—NEGLIGENCE—ERRONEOUS INSTRUCTION.—In an action against a railroad company for negligently injuring one of its employes, it is error to instruct the jury that it is the duty of the company "to do everything that can reasonably be done" for the safety of its employes, and to have the structures along its line "to be reasonably safe." The law does not require a railroad company, as a duty to employes, "to have the structures to be reasonably safe," but simply requires that it should exercise ordinary care to have them in that condition. (Galveston etc. Ry. Co. v. Gormley, 894.)

26. RAILROADS—EMPLOYEES—NEGLIGENCE—ORDINARY CARE—ERRONEOUS INSTRUCTION.—To define "ordinary care," in an action against a railroad company for negligently injuring an employe, as that degree of care which may reasonably be expected of one in the situation of the person injured, is erroneous, so far as it applies to the care required of the company. (Galveston etc. Ry. Co. v. Gormley, 894.)

27. RAILROADS—RULES—KNOWLEDGE—PROOF—ERRONEOUS INSTRUCTION.—If a railroad company has rules and regulations for its employes, it is not necessary, in an action against the company for fatal injuries to an employe, that the evidence should show that he had knowledge of such rules, but, in the absence of proof to the contrary, he will be presumed to have known them. Hence, an instruction requiring the company not only to prove that the deceased employe knew such rules, but to prove that it was insisting upon and enforcing them, is error, for if the plaintiff relies upon the abrogation of the rule by its nonenforcement, he must prove it. (Galveston etc. Ry. Co. v. Gormley, 894.)

28. STREET RAILWAYS.—A DOG ON A STREET RAILWAY TRACK in a public highway is not a trespasser. (Citizens' Rapid Transit Co. v. Dew, 754.)

29. STREET RAILWAYS—DOGS ON THE TRACK.—It is not true that a motorman in charge of a rapidly moving street-car can rely exclusively upon the keen sense of hearing, great alertness, intelligence, and celerity common to dogs when he sees one standing on the track, if, by so doing, he absolves himself from all duty and care to prevent an accident. (Citizens' Rapid Transit Co. v. Dew, 754.)

30. A STREET RAILWAY COMPANY IS LIABLE FOR NEGLIGENCE in running a car over a dog standing on its tracks in a public highway. (Citizens' Rapid Transit Co. v. Dew, 754.)

31. REAL PROPERTY—POOL OF WATER NEAR RAILWAY PLATFORM—DEATH OF CHILD—LIABILITY OF RAILROAD COMPANY.—Although a railway company allows a pool of water, several feet deep, to accumulate from a ditch near its platform, and a child falls therein and is drowned, the company is not answerable, even where the pool is near a path and plank across the ditch, used for access to and from the platform, by persons having business connected, in some way, with the company, if there is no evidence to show by what route the child reached the pool. (Dobbins v. Missouri etc. Ry. Co., 856.)

See Adverse Possession, 2; Animals, 2, 3; Evidence, 4, 6; Trial, 10; Witnesses, 1.

RAILROAD RELIEF DEPARTMENT.

See Release, 2.

RATIFICATION.

See Corporations, 3, 4; Deeds, 7.

REAL PROPERTY.

1. REAL PROPERTY—TRESPASSERS—DUTY OF LAND-OWNER.—It is not the duty of a landowner to keep his property in such condition that persons, whether children or adults, going thereon without his invitation may not be injured. (*Dobbins v. Missouri etc. Ry. Co.*, 856.)

2. REAL PROPERTY—INCLOSURE OF POOLS—LEGISLATIVE POWER AND DUTY.—As a police measure, the law-making power may, and doubtless should, compel the inclosure of pools, et cetera, situated on private property, in such close proximity to thickly populated places as to be unusually attractive and dangerous. When such a duty is imposed, the courts may properly enforce it, or allow damages for its breach, but not before. (*Dobbins v. Missouri etc. Ry. Co.*, 856.)

RECEIVERS.

1. JUDGMENTS—APPOINTING RECEIVER—VALIDITY.—A judgment appointing a receiver for a corporation is not void merely because some of the stockholders are related to the judge making the appointment. (*Ex parte Tinsley*, 818.)

2. EXECUTIONS—SUPPLEMENTARY PROCEEDINGS—APPOINTMENT OF RECEIVER—OBJECTIONS TO.—The proper time to present reasons why a receiver should not be appointed in proceedings supplementary to execution is at the time when the application for his appointment is made, and if the objection to such appointment is overruled and no appeal is taken within the proper time, such objection cannot be raised on appeal from an order refusing to dismiss the proceedings and all orders thereunder. (*Merchants' Nat. Bank v. Braithwaite*, 653.)

See Contempt, 9, 11.

RELEASE.

1. DAMAGES.—RELEASE of a claim for damages for injury received through negligence, even if obtained by fraud, is valid until disaffirmed by tendering back the consideration received. (*Chicago etc. R. R. Co. v. Curtis*, 456.)

2. RAILROAD COMPANIES—RELEASE OF DAMAGES.—An agreement by an employé of a railroad company, upon becoming a member of its relief department, that an acceptance of benefits from the relief fund shall release the company from liability for damages in case of injury, is valid and binding upon an employé who voluntarily signs such agreement and accepts such benefits. It estops him from suing the company for damages. (*Chicago etc. R. R. Co. v. Curtis*, 456.)

RELIGIOUS SOCIETIES.

1. ASSOCIATIONS—UNINCORPORATED—LIABILITY OF MEMBERS.—Members of an unincorporated church organization, who are actually instrumental in incurring liabilities for it, or who either authorize or ratify its transactions or those made in its name, are personally liable therefor, while those who in no way participate in such transactions are exempt from liability. (*Clark v. O'Rourke*, 389.)

2. ASSOCIATIONS — UNINCORPORATED — LIABILITY OF MEMBERS.—The members composing a building committee of an unincorporated church organization in charge of the work of constructing a church are individually liable for material furnished them for building, although it is charged to the organization and the seller was informed that the material would be paid for out of the proceeds of church fairs, voluntary subscriptions, and donations. (Clark v. O'Rourke, 389.)

3. ASSOCIATIONS—LIABILITY OF MEMBERS—PRACTICE. If a declaration in an action against the members of the building committee of an unincorporated church association to recover for materials furnished is broad enough to include the liability of the defendants as members of the association, and also their liability as agents of a principal having no legal existence, a judgment in favor of plaintiff cannot be reversed simply because his counsel relied upon the latter theory of defendant's liability. (Clark v. O'Rourke, 389.)

REPLEVIN.

1. REPLEVIN—DEMAND.—One who claims a crop of grain under an agreement for the tilling of his land on shares need not make a demand before bringing suit in replevin to recover the grain, if the person sowing it converts the whole crop to his own use and denies the agreement under which the plaintiff claims. (Breitenwischer v. Clough, 372.)

2. REPLEVIN.—A JUDGMENT FOR THE PENALTY OF A BOND given in an action of replevin without reference to the value of the property is allowable only after the plaintiff has failed to return the property and a writ of fieri facias has been returned unsatisfied, in whole or in part, and then at the term of the court to which the writ has been returned. (Nighbert v. Hornsby, 736.)

3. REPLEVIN.—IF THE DEFENDANT RECOVERS IN REPLEVIN, the judgment should be for double the value of the property if not returned, where the suit originated before a justice of the peace, though an appeal is taken to a higher court. (Nighbert v. Hornsby, 736.)

4. REPLEVIN AGAINST SHERIFF—WHEN MAINTAINABLE.—Replevin may be maintained against a sheriff after it has become his duty to deliver the property taken by him under a writ of replevin to one of the parties in that suit, and he fails after a reasonable time to make such delivery. (Welter v. Jacobson, 632.)

5. REPLEVIN AGAINST SHERIFF—WHEN NOT MAINTAINABLE.—If a sheriff is already in possession of property taken by him in proceedings in an action of replevin, a second replevin suit cannot be maintained against him for the same property by a stranger to the first action. (Welter v. Jacobson, 632.)

See Contempt, 12; Sheriffs, 1, 2.

RES JUDICATA.

See Judgments.

RESPONDEAT SUPERIOR.

See Master and Servant, 1, 2.

ROBBERY.

ROBBERY BY THREATENING TO DO ILLEGAL ACT.—Under a statute providing that "if any person, by threatening to do some illegal act injurious to the character, person, or property of another, shall fraudulently induce the person so threatened to de-

liver to him any property with intent to appropriate the same to his own use," he shall be guilty of robbery, the act threatened must be illegal. A threat to accuse a person of an offense, and to prosecute him therefor, when such person is guilty of such offense and the person making the threat knows that he is guilty, although he may not have seen the unlawful act committed, is not a threat to do an illegal act, and the obtaining of money from the accused by reason of such threat, is not robbery under such statute. (Davis v. State, 791.)

SALES.

TRANSFER OF PERSONAL PROPERTY—CHANGE IN POSSESSION.—When a known and previously recognized agent of an alleged vendor remains in possession of personal property, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title. Upon a sale of personal property or a transfer of it as security, a change in the character of the possession should be indicated by such outward, open, actual, and visible signs as can be seen and known by the public or persons dealing with the property. (Second Nat. Bank v. Gilbert, 306.)

SCHOOLS.

ASSESSMENTS FOR STREET IMPROVEMENTS.—A LOT BELONGING TO A SCHOOL DISTRICT is not liable for an assessment for street improvements if used for school purposes. If it is used for private purposes, or held as an investment or for rentals, or if, from any cause, it is not subject to the general rule exempting school property from such assessment, the complaint should so state. (Witter v. Mission School Dist., 83.)

See Banks, 1, 2.

SETOFF.

1. EXEMPTIONS.—MUTUAL JUDGMENTS CANNOT BE SET OFF against each other in such manner as to defeat the exemption laws. (Cleveland v. McCanna, 670.)

2. EXEMPTIONS — JUDGMENTS — SETOFF.—A judgment which represents the proceeds of exempt property cannot be set off on a judgment against the judgment creditor. (Cleveland v. McCanna, 670.)

3. EXEMPTIONS — JUDGMENTS — SETOFF.—One holding a judgment against his debtor cannot have it set off against a judgment in favor of his debtor, when such debtor proves that all of his personal property, including such judgment, is less than the amount allowed him by law as exempt. (Cleveland v. McCanna, 670.)

SHERIFFS.

1. SHERIFFS—REPLEVIN—WHEN PROTECTED BY WRIT. A sheriff can justify his seizure under a writ of replevin only as to such property described therein as he takes from the possession of the defendant in the action, and, if he takes it from another who has the control over it, he becomes a trespasser and liable in trover, if it is in fact the property of such third person. But replevin cannot be maintained against the sheriff, in such case, unless he fails, within a reasonable time, to deliver the property to the party from whom it was taken. (Welter v. Jacobson, 632.)

2. SHERIFFS—REPLEVIN—LIABILITY TO THIRD PERSON IN TROVER.—If a sheriff, after taking property under a writ of replevin, is served with notice of a claim of ownership of the property by a third person, he renders himself liable in trover to such

third person if he delivers the property to the plaintiff in replevin and such claim of ownership is proved. It is the privilege of the sheriff in such case to demand indemnity of the plaintiff in replevin, and if the latter refuses, or fails within a reasonable time to indemnify him, he may surrender the property to the defendant from whom he took it, and thus exonerate himself from all liability. (*Welter v. Jacobson*, 632.)

See Contempt, 12; Executions, 22; Replevin, 4, 5.

SHIPPING.

1. SHIPPING—CARRIERS' IMPLIED OBLIGATION TO DELIVER IN GOOD CONDITION.—Where a carrier having complete control of a vessel agrees to receive a cargo in one place and to transport it to, and deliver it at, another, there is an obligation implied that the loading and unloading of the cargo shall be so conducted by the carrier that no unnecessary injury shall be done thereto. (*Kerry v. Pacific Marine Co.*, 65.)

2. SHIPPING—CHARTER PARTY—WHO IS OWNER FOR THE VOYAGE SO AS TO BE LIABLE FOR BREACHES OF DUTY.—A charter party stipulating that one of the parties thereto will furnish a vessel and keep it in good condition during a voyage, that it will receive a specific cargo and deliver it at the port of destination, that the whole of the vessel except certain parts for the use of the crew shall be at the sole use of the other party, who shall pay certain specified rates, does not make the owner or shipper of the cargo the owner of the voyage. On the contrary, the party furnishing the vessel is such owner, and, as such, liable for any breach of duty respecting the care, loading, and unloading of the cargo. (*Kerry v. Pacific Marine Co.*, 65.)

3. SHIPPING.—ONE PURPORTING TO ENTER INTO A CHARTER PARTY AS MANAGING OWNER OF A VESSEL, and who in fact owns nine-sixteenths thereof, is personally liable under such charter party for any breach thereof or of its implied obligations, where it does not disclose the name of any principal for whom such managing owner acts as agent. (*Kerry v. Pacific Marine Co.*, 65.)

4. SHIPPING—PART OWNERS—LIABILITY OF.—If an action is brought against a part owner upon a contract relating to a ship, and he does not, by proper plea, object that the other owners are not joined with him, the plaintiff may recover his whole demand of such joint owner, who, on his part, may afterward pursue the others for contribution. (*Kerry v. Pacific Marine Co.*, 65.)

5. SHIPPING.—The act of Congress, limiting the liability of part owners of vessels, does not prohibit their contracting so as to be answerable for the entire damage which may result from a breach of the contract. If any of them does so contract, such act of Congress does not relieve him. (*Kerry v. Pacific Marine Co.*, 65.)

SIDEWALKS.

See Highways; Landlord and Tenant, 4; Municipal Corporations, 3, 4.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE CANNOT BE DECREED OF ANY AGREEMENT THE TERMS OF WHICH ARE NOT SUFFICIENTLY CERTAIN to make the precise act which is to be done clearly ascertainable. (*Russell v. Agar*, 35.)

2. SPECIFIC PERFORMANCE—WANT OF MUTUALITY.—It is not necessary to authorize the specific performance of a written

agreement that it should be signed by the party seeking to enforce it. (McPherson v. Fargo, 723.)

STARE DECISIS.

See Appeal, 1.

STATES.

STATUTES—STATE—WHEN NOT SUBJECT TO.—The state is not bound by general words in a statute which would operate to trench on its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it. (Witter v. Mission School Dist., 33.)

See Corporations, 1.

STATUTE OF FRAUDS.

See Contracts, 4, 5.

STATUTES.

1. STATUTES—PASSING UPON CONSTITUTIONALITY.—Courts will not declare a statute unconstitutional unless it is clearly so. (State v. Tibbets, 492.)

2. CONSTITUTIONAL LAW—POLICE PENSIONS.—A statute providing that any person who shall serve as a policeman for twenty years or more may be retired from active service, on half-pay, for the remainder of his life, is void as violating a constitutional provision declaring that the legislature shall have no power to authorize a grant of public money in aid of or to any individual. Nor can such statute be upheld on the ground that such pension is part of the contract of employment of such policeman, and that the payment to him of half his former salary after retirement is in compensation for services rendered theretofore. (State v. Ziegenhein, 420.)

3. STATUTES—CONSTRUCTION— PROSPECTIVE ACTION. A statute providing that any person who shall serve as a policeman for twenty years or more may be retired from active service on half-pay for the remainder of his life is prospective in its application; and no policeman is within its provisions, unless he shall have been in active service as such for twenty years after such statute went into effect. (State v. Ziegenhein, 420.)

4. STATUTES—CONSTITUTIONAL PROVISIONS AS TO TITLES.—A constitutional provision that no bill shall contain more than one subject, which shall be expressed in its title, is mandatory, but it is not to be exactly enforced, or in such a manner as to hamper or cripple legislation. (State v. Tibbets, 492.)

5. STATUTES—TITLES—MUST INCLUDE SUBJECT MATTER.—An act is unconstitutional and void if its title is not broad enough to include the subject matter of the legislation. (State v. Tibbets, 492.)

6. STATUTES — TITLES — WHEN SUFFICIENT — GENERALITY.—The title of a bill may be general, and need not specify every clause in the proposed statute. It is sufficient if they are all referable and cognate to the subject expressed; and, if the subject matter is within the scope of the title, the title is good. (State v. Tibbets, 492.)

7. STATUTES — TITLES — COMPREHENSIVENESS — PLURALITY OF SUBJECTS.—A constitutional provision that no bill shall contain more than one subject does not prohibit comprehensive titles, but does prohibit a plurality of subjects. (State v. Tibbets, 492.)

8. STATUTES—TITLES MUST EXPRESS SUBJECT OF LITIGATION.—The title of an act, whether of original legislation, or amendatory thereof, must fairly express the subject of legislation. (State v. Tibbets, 492.)

9. STATUTES—AMENDMENTS—TITLES.—Under the title of a bill to amend an existing act, or a section thereof, no amendment is permissible which is not germane to the subject of the original legislation. (State v. Tibbets, 492.)

10. STATUTES—AMENDMENTS—REQUIREMENTS AS TO.—An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections. (State v. Tibbets, 492.)

11. STATUTES — AMENDMENTS — MUST BE GERMANE—LIMITED TITLES.—Under a title which purports to amend certain designated sections of a prior act, the amendment of any section must be germane to the particular original section proposed to be changed. If not, the amendatory section is void, for such a title is limited and restrictive, and courts have no power to enlarge its scope. (State v. Tibbets, 492.)

12. STATUTES — AMENDMENTS CONTAINING FOREIGN MATTER—INVALIDITY OF.—An act which purports to amend a certain section of a prior act is unconstitutional and void where it contains subject matter not expressed in its title, and wholly foreign to the legislation embraced in the original section, as where the general object of the original section is the licensing of liquors, and the subject matter of the amendatory section concerns the creation of a board of fire and police commissioners. (State v. Tibbets, 492.)

See Deeds, 12; Gaming, 1-3; Limitations of Actions, 1, 2; Railroad Companies, 7; Robbery; States; Police Power; Taxation.

STATUTES OF LIMITATION.

See Limitations of Actions.

SUBMISSION OF CAUSES.

See Trial, 5.

SUBROGATION.

THE DOCTRINE OF SUBROGATION OR SUBSTITUTION does not flow from any fixed rule of law. It is applied by courts of equity to prevent a miscarriage of justice, and it is a familiar principle that "he who asks equity must do equity." (Ocobock v. Baker, 519.)

See Mortgages, 10; Negotiable Instruments, 4.

SURETYSHIP.

SURETIES FOR A FIRM—LIABILITY OF AFTER ITS DISSOLUTION.—Sureties who become such to secure an obligee for a loss or misappropriation of funds of a firm consisting of A and B, or either of them, or anyone to whom they shall intrust the business of such obligee, are not liable after the dissolution of the firm for the acts and defaults of the member who retains and continues to conduct the business though the obligee is not aware of the dissolution of the firm. (Standard Oil Company v. Arnestad, 604.)

SWINDLING.

See False Pretenses, 1-4.

TAXES.

1. **CONSTITUTIONAL LAW—RIGHT TO TAX CORPORATE STOCK OF ALIENS.**—A state has the power to tax the corporate stock of a domestic corporation owned by aliens at a higher rate than that owned by resident stockholders. (*State v. Travelers' Ins. Co.*, 138.)

2. **TAXATION OF CORPORATE STOCK OF NONRESIDENT OWNERS.**—A nonresident stockholder in a corporation who remains such after the passage of a law increasing the tax on stock owned by nonresidents at a certain time, must be deemed to have assented to the payment of the increased tax. (*State v. Travelers' Ins. Co.*, 138.)

3. **TAXATION OF CORPORATE STOCK OF NONRESIDENTS.**—A statute requiring corporations to pay to the state an annual tax of a certain per cent upon the market value of their stock owned by nonresidents, although in form a tax against the corporation, is in substance a tax against each nonresident stockholder to be paid by the corporation in his behalf. (*State v. Travelers' Ins. Co.*, 138.)

4. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TAXATION OF STOCK OWNED BY NONRESIDENTS.**—A statute requiring the payment by each corporation whose stock is liable to taxation, and not otherwise taxed, of one and one-half per cent of the value of the stock of nonresident stockholders, is not unconstitutional as depriving the corporation of its property without due process of law, although another statute gives the corporation a lien on such stock for only one per cent of the value of the stock for such payments, when another statute gives the corporation a lien on all the stock owned by any person therein for all debts due to it from him, and still another statute provides that all taxes properly assessed shall become a debt due from the person whose property is taxed. (*State v. Traveler's Ins. Co.*, 138.)

5. **CONSTITUTIONAL LAW—TAXATION OF CORPORATE STOCK OF NONRESIDENTS.**—A statute providing for the payment by each corporation whose stock is liable to taxation, and not otherwise taxed, of a specified per cent of the value of the shares of nonresident stockholders, as taxes, is not unconstitutional as attempting to impose a tax on personal property outside the jurisdiction of the state, as the state has power to give the shares of the corporation a situs within the state for the purpose of taxation. (*State v. Travelers' Ins. Co.*, 138.)

6. **TAXATION OF CORPORATE STOCK.**—The power which creates a corporation can give its capital stock a situs within the state for the purposes of taxation. (*State v. Travelers' Ins. Co.*, 138.)

7. **TAXATION OF CORPORATE STOCK OF NONRESIDENT OWNERS.**—The fact that the property of a corporation which gives value to its stock is taxed does not prevent the imposition of a tax on the stock of nonresidents, under a statute providing for the payment of a tax on shares of nonresident stockholders by each corporation whose stock is liable to taxation and not otherwise taxed. (*State v. Travelers' Ins. Co.*, 138.)

8. **TAXATION OF CORPORATE STOCK OF ALIEN OWNERS.**—A statute providing that the shares of every resident stockholder in specified corporations shall be set in his taxable list in the town where he resides, but that so much of the capital of the corporation as may be invested in real estate on which it pays a tax shall be deducted from the market value of the stock in its returns to the assessors, does not apply to alien stockholders. (*State v. Travelers' Ins. Co.*, 138.)

9. TAXATION—CORRECTION OF VALUATION OF CORPORATE STOCK.—An error in the mathematical process by which the valuation of corporate stock owned by nonresidents or aliens is reached for the purpose of taxation may be corrected by the courts, although a statute provides that such valuation, as made by the board of equalization, shall be final. (*State v. Traveler's Ins. Co.*, 138.)

TAX SALES.

See Mortgages, 5, 6.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES ARE TO BE TREATED AS COMMON CARRIERS, and are, therefore, bound by a constitutional provision that no common carrier shall be permitted to contract for relief against its common-law liability. (*Western Union Tel. Co. v. Eubanks*, 361.)

2. TELEGRAPH COMPANIES—CONTRACT AGAINST NEGLIGENCE.—If a telegraph company causes injury by its neglect in transmitting a message, no contract or agreement between it and the sender will bar a recovery. (*Western Union Tel. Co. v. Eubanks*, 361.)

3. TELEGRAPH COMPANIES—STIPULATIONS AS TO CIPHER MESSAGES.—Public policy forbids that a telegraph company should, by any contract, exempt itself from damages resulting from its negligence in transmitting cipher or obscure messages. (*Western Union Tel. Co. v. Eubanks*, 361.)

4. TELEGRAPH COMPANIES—VALIDITY OF STIPULATION AS TO REPEATING MESSAGES.—A printed stipulation upon the back of a blank, used for sending a telegraph message, that the telegraph company shall not be answerable for mistakes or delays unless the message is repeated, is invalid, because it is a contract which seeks to limit or restrict the company's liability for negligence. (*Western Union Tel. Co. v. Eubanks*, 361.)

5. TELEGRAPH COMPANIES—VALIDITY OF STIPULATION LIMITING TIME FOR PRESENTING CLAIMS FOR DAMAGES. A printed stipulation upon the back of a blank used for sending a telegraph message, that the company shall not be answerable for damages if the claim therefor is not presented in writing within sixty days after the message is filed with the company for transmission, is unreasonable, contrary to public policy, and violative of the constitution, not only as an attempt to vary the statute of limitations, but as a contract limiting the common-law liability of carriers. (*Western Union Tel. Co. v. Eubanks*, 361.)

6. TELEGRAPH COMPANIES—ABSENT ADDRESSEE OF MESSAGE—DUTY OF DELIVERY TO HIS WIFE.—It is the duty of a telegraph company to deliver a message to the addressee, though he is away from his home or place of business, if he can, by reasonable efforts of the company, be found; but whether ordinary diligence has been used is a question of fact for the jury, and it is error to instruct them that it is, as a matter of law, the duty of the company, in such a case, to deliver the message to the addressee's wife, at their home, for a wife as such, is not, in law, the general agent of her husband. (*Western Union Tel. Co. v. Mitchell*, 906.)

7. TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGES—MENTAL SUFFERING AS AN ELEMENT OF DAMAGES.—A telegram sent by a sick man's wife to her daughter, as follows: "To Bertha Wincker. Luck is very sick; come home at

once. *Mina Luck*—is not notice to the telegraph company that the addressee is the daughter of the sender of the message. Hence, if the telegram is delayed, and the sick man's death and funeral take place before the daughter arrives, the company, having no notice of anything which would bring about suffering on the part of the wife, is not answerable in damages for her mental suffering and distress, caused by a want of the consoling presence of her daughter at the burial, where she would have been present at the funeral, but could not have been present at the death, if the message had not been delayed. (*Western Union Tel. Co. v. Luck*, 869.)

8. TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—DAMAGES—PLEADING.—If a telegram sent to an absent owner of a cattle ranch, by one in charge thereof, notifying him of the lowness of water on the place, is delayed, and such owner sues the telegraph company, alleging that its negligent failure to deliver the message prevented him from repairing to his ranch and making arrangements for water for his cattle, in consequence of which he suffered damages specially set out, his complaint is subject to special demurrer, if it does not allege when, where, and in what manner he could have arranged to get water for his cattle and thereby avoid the injuries complained of. (*Western Union Tel. Co. v. Mitchell*, 906.)

9. TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—DAMAGES—EVIDENCE.—What a party would do under a given state of facts which call upon him to perform a duty to some other person is a fact which can be testified to by such party. Hence, if a telegraph company fails to perform a duty which it owes to the addressee of a message in not delivering it to some other person for him, he is entitled to show that, if the duty had been performed, such person would have transmitted the message to him, thereby averting the injury, if any, caused by such breach of duty. (*Western Union Tel. Co. v. Mitchell*, 906.)

10. TELEGRAPH COMPANIES—DELAYED MESSAGE—DAMAGES.—If there is delay in delivering a telegraph message to ship a load of mules on a certain day, and it is shown that the mules could, and would, have been shipped on that day, if the message had been delivered within a reasonable time after it reached the place of destination, the addressee may recover damages for loss sustained in not shipping the mules on that day, as such damages are not, in a legal sense, remote or speculative. (*Western Union Tel. Co. v. Eubanks*, 861.)

See Gaming, 3.

TENDER.

TENDER—WHEN NEED NOT BE MADE.—If one party to a contract notifies the other that he will no longer be bound by it, the latter is excused from making any tender of a sum he is required to pay thereunder. (*McPherson v. Fargo*, 723.)

TERRITORIES.

See Courts, 1.

TRESPASS.

See Railroad Companies, 28; Real Property, 1.

TRIAL.

1. JURY TRIAL.—THE COERCION OF THE JURORS until they agreed upon a verdict seems to have been warranted by the common law. This common-law rule has been swept away. Any

attempt on the part of the court to drive the jurors into an agreement demands a new trial. (People v. Sheldon, 564.)

2. JURY TRIAL—IMPROPER COERCION OF THE JURORS—WHAT IS.—A jury, after a seven weeks' trial in a criminal cause, during all of which time they had been kept together, retired in the evening and were considering their verdict until noon of the next day, at which time they came into court and asked some questions concerning the evidence. The desired information was given by the reading of the reporter's notes. They again retired, and, after being absent more than three hours, returned to the court and announced that they had not agreed. Thereupon the court told them that it was for the interests of all concerned that there should be a decision; that he could not hear of a disagreement, and they must retire. They did as requested, but came back at the end of two hours requesting further instructions, which were given. The next day, a little before 1 o'clock in the afternoon, the jury, by the foreman, communicated with the judge in writing, stating that in his opinion an agreement was impossible. The court answered that the jury be conducted to a hotel and then brought back for further deliberation, saying, "I have made my own arrangements so as to be back at your call for to-day and for some time in the future, so that this case may be fully disposed of, if there is a possibility of it." He also, on their return to court, further addressed them relating to the length of the trial and the importance of reaching an agreement, adding: "To say at the end of all that time, at the end of all this labor and expense, that the question is no better off than it was when it started, is almost to confess incompetency in this matter." After being out eighty-four hours without beds or cots, one-half of the time in a small room, the jury agreed. It was hence held that the circumstances indicated that the jury had been improperly coerced, and that a new trial should be granted. (People v. Sheldon, 564.)

3. TRIAL—QUESTION OF INFERENCES IS FOR JURY, WHEN.—If reasonable men might differ as to inferences to be drawn from certain evidence, the matter should be left to the jury, although there may be no conflict in the evidence. (Dixon v. Bristol Sav. Bank, 193.)

4. A NONSUIT SHOULD BE GRANTED ONLY where all the facts proved and all reasonable deductions from them do not entitle the plaintiff to recover. (Dixon v. Bristol Sav. Bank, 193.)

5. PRACTICE.—One who submits his case on a motion to direct judgment in his favor submits it both upon the facts and the law, and cannot afterward urge that there were questions of fact which should have been left to the jury. (Angier v. Western Assurance Co., 685.)

6. EVIDENCE.—A GENERAL OBJECTION to evidence is not sufficient to raise any question which could have been obviated, had it been specifically pointed out. (Kolka v. Jones, 615.)

7. PRACTICE—MOTION TO STRIKE OUT EVIDENCE.—The sufficiency of competent evidence to prove a fact cannot be challenged by motion to strike out evidence properly received. The remedy of the party, if such evidence is not legally sufficient to support a finding against him, is to ask the court to instruct the jury to disregard it. (Kolka v. Jones, 615.)

8. TRIAL—PROPER ARGUMENT.—HISTORICAL ALLUSIONS, by counsel, during argument, to celebrated cases of circumstantial evidence, are not improper argument or ground for reversal. (Jackson v. Commonwealth, 338.)

9. JURY TRIAL—IMPROPER REMARKS OF COUNSEL.—If, when a remark is made by counsel in the course of his argument

before a jury, it is objected to and the court sustains the objection, and no further action or ruling upon the subject is requested, such remark does not constitute any ground for a reversal or a new trial. (Illinois Cent. R. R. Co. v. Beebe, 253.)

10. TRIAL—FAILURE TO PRODUCE WITNESS HAVING KNOWLEDGE—PROPER ARGUMENT.—In a case where an employé of a railroad company seeks, upon conflicting evidence, to recover damages against the company for personal injuries, and the defendant fails to introduce and examine as a witness one of its employés who was present at the time of the injury, it is proper for the plaintiff's counsel to argue to the jury, whether his contention is well founded or not, that such failure is a circumstance from which an inference may be drawn that, if such employé had been introduced and examined, he would have testified to facts prejudicial to the company; and it makes no difference that counsel for the company caused the employé to be present in court, so that he could have been called by the plaintiff. (Western etc. R. R. Co. v. Morrison, 173.)

See Agency, 2; Contracts, 8; Homicide, 18, 19.

TROVER.

See Chattel Mortgages, 10; Sheriffs, 2.

TRUSTS.

1. WILLS—CONSTRUCTION—TRUSTS.—Under a will devising a specified share of the testator's property to his daughter for her sole and separate use, and a codicil revoking such provision, and devising such share to the testator's wife in trust, to invest and manage it, and pay and deliver it over to such daughter from time to time during her life as the wife might deem for the best interests and welfare of such daughter, the latter is entitled upon the death of her mother to demand and recover from a trustee appointed in place of such mother the balance remaining of such share as such trustee has no discretionary power to withhold any part of such share. (Security Co. v. Snow, 107.)

2. TRUSTS—FRAUD—MORAL OBLIGATION TO RECONVEY. Courts of equity recognize that there is a moral obligation resting upon a fraudulent grantee, who has promised to reconvey, to execute his trust, and, although they will not enforce its execution, they will uphold it when performed. (Bicocchi v. Casey-Swasey Co., 875.)

3. TRUSTS.—THE PRESUMPTION IS THAT A TRUSTEE will faithfully administer his trust and not misappropriate funds committed to his care. (American Trust etc. Co. v. Boone, 167.)

4. TRUSTS—FRAUD—RIGHTS OF TRUSTEE'S CREDITORS—SUIT BY BENEFICIARY TO REMOVE CLOUD ON TITLE.—Under facts showing that a person, who was separated from his wife, bought a lot, and, for the purpose of defrauding her of her community rights, had the deed made to another in trust for the buyer; that the purchaser improved the lot by building a house thereon, and occupied the house, exercising every act of ownership; that seven years later the trustee conveyed the property to the cestui que trust in accordance with his promise to do so; that the trustee had, in the mean time, obtained credit on the faith of the deed to himself and of his representations that he owned the property; and that creditors of the trustee, after the last conveyance, levied attachments upon the lot, in a suit against him, and obtained judgments accordingly, it must be held that the deed of reconveyance was made upon a valuable and sufficient consideration; that such

creditors acquired no rights in the property, by their judgments, as against the beneficiary; and that the latter is entitled to maintain a suit against them to remove the cloud upon his title. (*Bicocchi v. Casey-Swasey Co.*, 875.)

5. TRUSTS—ENFORCEMENT OF, WHEN FRAUDULENT—OBLIGATION TO RECONVEY.—The fact that a fraudulent grantor cannot enforce a secret trust against his fraudulent grantee proves that he has no legal right, but it does not prove that the grantee ought not to execute such trust. (*Bicocchi v. Casey-Swasey Co.*, 875.)

6. TRUSTS—FRAUDULENT INTENT—RIGHTS OF TRUSTEE'S CREDITORS.—If a fraudulent grantee holds property in secret trust for a fraudulent grantor, the rights of the grantee's creditors must be the same, whether the trust was created with or without fraudulent intent, because the intent of the person, who created the trust, to commit fraud, could not injure the creditors of his grantee. (*Bicocchi v. Casey-Swasey Co.*, 875.)

7. TRUSTS—FRAUD—PREFERRING CREDITORS—RECONVEYANCE IS VALID AS AGAINST CREDITORS OF TRUSTEE. A debtor may prefer a creditor, if done in good faith, and, in the same way, may execute a trust to the prejudice of creditors. Hence, if a fraudulent grantee conveys the property to the fraudulent grantor in compliance with his agreement to do so, the conveyance is good, although the grantee intended to defraud his own creditors, by making such conveyance, because the moral obligation which he owed to the grantor to convey the property to him in execution of the trust was equal to his obligation to his creditors to pay their debts. Such a deed could not be held to be fraudulent, and fraud practiced in creating the debts could not avoid the deed thus made. (*Bicocchi v. Casey-Swasey Co.*, 875.)

8. TRUSTS—FRAUD—ESTOPPEL TO DENY RIGHTS OF TRUSTEE'S CREDITORS.—A fraudulent grantor after a reconveyance under a promise to do so is not estopped to deny the rights of creditors of the fraudulent grantee because the title was permitted to remain in the name of the grantee, or because the grantee represented the property to be his own, and obtained credit upon faith of the ownership. (*Bicocchi v. Casey-Swasey Co.*, 875.)

9. TRUSTS—FRAUDULENT TRUSTEE—RIGHTS OF HIS CREDITORS.—While the legal title to property remains in a fraudulent grantee, his creditors may subject it to the payment of their debts, by proper legal proceedings, but, if the fraudulent grantee reconveys to the fraudulent grantor, before any lien attaches in favor of the creditors of the former, they cannot subject the property to the payment of their debts. (*Bicocchi v. Casey-Swasey Co.*, 875.)

10. TRUSTS—FRAUD—CONSIDERATION FOR RECONVEYANCE.—When a fraudulent grantee has, in compliance with his verbal agreement, made a reconveyance of the property to the fraudulent grantor, the moral obligation under which he placed himself to make this reconveyance is a valuable and sufficient consideration to support the deed of reconveyance. (*Bicocchi v. Casey-Swasey Co.*, 875.)

See Banks, 1, 3-6; Cotenancy, 5, 6; Husband and Wife, 1.

USAGE.

See Custom.

VACCINATION.

See Police Power, 24.

VENDOR AND PURCHASER.

1. VENDOR AND VENDEE—REPRESENTATIONS AS TO VALUE.—A mere naked assertion of value, made between vendor and vendee during negotiations for a sale, though untrue and known to be so by the one who makes it, and relied upon by the other to his hurt, does not constitute an actionable deceit, in the absence of a position of trust or confidence between the parties, or of special knowledge of the value possessed by one, and entirely relied upon by the other. (*Gustafson v. Rustemeyer*, 92.)

2. VENDOR AND PURCHASER—NOTE FOR PURCHASE PRICE—PAYMENT.—The execution and delivery of negotiable paper for the purchase price of land, or any part thereof, does not constitute payment as between the grantor and grantee, so long as such paper remains in the hands of the grantor. (*Fluegel v. Heaschel*, 642.)

3. PURCHASER—PRESUMPTION OF GOOD FAITH.—Where two conveyances have been made of the same property by the same grantor, and the one last executed was first recorded, it will be presumed that the grantee therein purchased in good faith, for valuable consideration, and without notice of the prior unrecorded conveyance. (*Parrish v. Mahany*, 715.)

4. VENDOR AND VENDEE—FALSE REPRESENTATIONS AS TO VALUE.—A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable, unless the buyer has been fraudulently induced to forbear inquiry as to its truth, and, in that case, the means by which he was induced to forbid inquiry must be specially pleaded. (*Gustafson v. Rustemeyer*, 92.)

5. VENDOR AND VENDEE—FALSE REPRESENTATIONS—REMEDY.—A vendee induced to purchase land by false and fraudulent representations, may, acting seasonably, rescind the contract; and after giving, or offering to give, back what he received, recover the consideration, or he may retain the land and recover damages, in a proper action, for deceit. (*Gustafson v. Rustemeyer*, 92.)

6. VENDOR AND VENDEE—FALSE REPRESENTATIONS—MEASURE OF DAMAGES.—In actions to recover for false representations, deceit, or breach of warranty in sales of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented to be. (*Gustafson v. Rustemeyer*, 92.)

7. VENDOR AND VENDEE—FALSE REPRESENTATIONS—EVIDENCE OF.—False representations as to the boundaries and dimensions of land, made by a vendor, are admissible to show fraud inducing the vendee to accept a deed of the property reciting that the acreage thereof is "more or less." (*Gustafson v. Rustemeyer*, 92.)

See *Contracts*, 5; *Fraudulent Conveyances*, 3-6; *Mortgage*, 2-4; *Notice*.

WAIVER.

See *Appeal*, 2; *Attorney and Client*, 2; *Insurance*, 7.

WAREHOUSEMEN.

1. WAREHOUSE RECEIPTS.—THE INDORSEMENT AND DELIVERY of a warehouse receipt transfers the legal title and the constructive possession of the property to the indorsee, and the warehouseman thereafter becomes his bailee and holds the property for him. (*State Bank v. Waterhouse*, 82.)

2. WAREHOUSE RECEIPTS—INDORSEMENT OF—NOTICE OF LIENS.—An agreement between an original owner of goods and a warehouseman that the goods shall remain in the warehouse until the purchase price thereof has been paid and the revenue tax repaid, does not affect a subsequent bona fide indorsee of the warehouse receipt without notice. (*State Bank v. Waterhouse*, 82.)

3. WAREHOUSE RECEIPTS—INDORSEMENT OF—NOTICE OF LIENS—ESTOPPEL.—If a warehouse receipt provides that certain whiskey is to be delivered upon surrender of the receipt, payment of revenue tax, "and all other amounts due," the words quoted cover only proper warehouse charges, and are not notice to a subsequent indorsee of the receipt that a lien exists in favor of the original owner for the purchase price of the whiskey. (*State Bank v. Waterhouse*, 82.)

4. WAREHOUSE RECEIPTS—INDORSEMENTS OF—NOTICE OF LIENS—ESTOPPEL.—If a warehouseman has paid the revenue tax upon whiskey in store, and, issued his receipt therefor reciting that such tax has been paid, he is estopped, as against a bona fide indorsee without notice, from claiming the amount of the tax paid. (*State Bank v. Waterhouse*, 82.)

WAYS.

See Private Ways.

WILLS.

1. WILLS.—DOCTRINE OF APPROXIMATION can never be invoked in construing a will when its application would sacrifice the main object of a testator to one of his incidental purposes. (*Security Co. v. Snow*, 107.)

2. WILL—AGREEMENT TO MAKE—WHEN TOO INDEFINITE TO BE ENFORCED.—A promise to an employe that if he will remain with his employer, and not enter into a contemplated business partnership with others, the employer will bequeath to the employe such a sum of money as will make good any loss to be suffered by him by not entering into such copartnership, is too indefinite and uncertain to support an action against the executor of such employer for his failure to make a bequest in favor of the employe. There can be no means of determining what would have been the result of the partnership had it been formed. (*Russell v. Agar*, 35.)

3. WILLS—CONSTRUCTION—GIFT IN LIEU OF DOWER.—If a testator, by one clause of his will, gives the residue of his property, real and personal, to his wife, and provides by a subsequent clause in the will that if she remarries she shall have only one-third of such residue, upon her remarriage two-thirds of such residue becomes intestate estate, and the gift of one-third thereof is in lieu of dower, which estops her from claiming dower in such intestate residue, but she is entitled, under the statute of distributions to one-third of the intestate personalty. (*Bennett v. Packer*, 112.)

4. WILLS—CONSTRUCTION—CONDITION AGAINST MARRIAGE.—If a testator, by one clause of his will, gives the residue of his property to his wife, and in a subsequent clause provides that if she marries after his decease she shall take but one-third of such residue, such limitation is not void as in terrorem and as placing a restraint upon marriage. (*Bennett v. Packer*, 112.)

5. WILLS—CONSTRUCTION—ABSOLUTE DEVISE OR CONDITIONAL LIMITATION.—If a testator by one clause of his will bequeaths the residue of his property to his wife, and, in a subse-

quent clause provides that if she marries after his decease, she shall take but one-third of such residue, she does not take an absolute title to the residue, but takes two-thirds thereof upon a conditional limitation, by which, upon her subsequent marriage, that part of the estate becomes ipso facto intestate, without re-entry or other act by the heirs of the testator. (Bennett v. Packer, 112.)

6. **WILLS—CONSTRUCTION.—REVOCATION BY CODICIL** of a provision of a will with regard to a specified share of an estate indissolubly coupled with the creation of a substituted provision in regard to such share, falls, and the original provision of the will becomes operative, when such substituted provision becomes inoperative. (Security Co. v. Snow, 107.)

7. **WILLS—VALIDITY OF—LEGAL KNOWLEDGE IS NOT ESSENTIAL TO.**—It is not essential to the validity of a will that the testator should comprehend its provisions in their legal form, or that he should be skilled in the law. It is sufficient if he understands the disposition made of his property, especially where it appears that the instrument signed by the testator was read over to him by the attorney who drafted it, that its legal terms and its practical effect were fully explained to him, and he stated, unequivocally, that he fully understood its provisions, and that they were in accord with his wishes. (O'Brien v. Spalding, 202.)

8. **WILLS—EXECUTION OF—ATTORNEY AS A COMPETENT WITNESS—PRIVILEGED COMMUNICATIONS.**—If an attorney at law is employed by a testator to draft a will, he may, after the testator's death, and when the will is presented for probate, testify as to what occurred at the time of its execution, without violating the policy of the law which forbids privileged communications between attorney and client from being disclosed to the injury of the client, conceding that this relation existed between the attorney and the testator at the time of the execution of the will. (O'Brien v. Spalding, 202.)

9. **WILLS—EXECUTION—ATTORNEY AS A COMPETENT WITNESS — PRIVILEGED COMMUNICATIONS — STATUTE.**—When a will is offered for probate, the existence of a statute declaring that, "No attorney shall be competent or compellable to testify, in any court in this state, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney," does not render incompetent the testimony of an attorney at law, who prepared the will and signed it as one of the attesting witnesses, where he is called upon to state what occurred at the time of the execution of the will, as the attorney, in such a case, is not testifying "for or against his client," or for or against the interests of the client's estate. (O'Brien v. Spalding, 202.)

10. **WILLS—EXECUTION OF—COMPETENCY OF ATTORNEY WHO DRAFTED WILL AND SIGNED IT AS AN ATTESTING WITNESS.**—An attorney at law who drafts a will and signs it as a witness is competent, when the will is offered for probate, to testify as to the testator's mental condition, the latter's knowledge or ignorance, of the contents of the paper, and as to what was done at the time of its execution. (O'Brien v. Spalding, 202.)

11. **WILLS—EXECUTION OF—WITNESS—COMPETENCY OF ATTORNEY CONSULTED AS A FRIEND.**—If an attorney at law is consulted, with respect to a testamentary disposition of property, in the capacity of a friend, and not as a legal adviser, is nominated executor, and he makes and delivers to another person a memorandum from which a will is subsequently drafted by the latter, there is no relationship of attorney and client between the attorney and

the testator as to the preparation of the will, and the attorney is a competent witness as to what occurred at the time of such consultation. (*O'Brien v. Spalding*, 202.)

12. WILLS—EXECUTION OF—ADMISSIBILITY OF IN EVIDENCE, WHEN ATTESTED BY THREE COMPETENT WITNESSES.—A paper purporting to be a will and signed by three attesting witnesses is admissible in evidence as a will, under a statute requiring that it shall have at least three competent witnesses, although one of the witnesses was an attorney at law, who prepared the paper and signed it as an attesting witness at the request of the testator. (*O'Brien v. Spalding*, 202.)

See Attorney and Client, 8, 4; Trusts, 1.

WITNESSES.

1. WITNESSES HAVING KNOWLEDGE—FAILURE TO EXAMINE THOUGH PRODUCED — PRESUMPTION — INSTRUCTION.—In a case where an employé of a railroad company seeks, upon conflicting evidence, to recover damages against the company for personal injuries, and the defendant fails to introduce and examine one of its employés who was present at the time of the injury, though the company has the witness in court, it is proper to refuse the defendant's request for an instruction charging, in effect, that such production of the employé in court was sufficient to relieve the defendant of any presumption or inference that, in case he had been examined, he would have testified to facts showing negligence on the company's part. (*Western etc. R. R. Co. v. Morrison*, 173.)

2. WITNESSES—CORROBORATION.—If a witness testifies on a trial to a fact, and the opposing side shows, or attempts to show, that he made conflicting statements about that fact, the party introducing such witness can prove that he made a similar statement soon after the transaction occurred. (*Kimball v. State*, 799.)

3. WITNESSES — OBJECTION TO WHOLE ANSWER IS PROPERLY OVERRULED, WHEN.—Though part only of a witness' answer is objectionable, it is not error to overrule an objection to the whole answer, if the objector does not separate the admissible part from the inadmissible, as he should do. The court is not required to do it. (*Galveston etc. Ry. Co. v. Gormley*, 894.)

4. WITNESSES—ACCUSED AS WITNESS—DISMISSAL OF PROSECUTION.—The prosecution may be dismissed as to one or more defendants jointly indicted with others, with a guaranty on the part of the court against any other or further prosecution for the same offense in that case; and he or they may be then required to testify in that particular case except as to such matters as may tend to incriminate the witness in other cases of a similar nature still pending against him. (*Ex parte Park*, 835.)

5. WITNESSES—INCRIMINATING.—A witness cannot be compelled to answer any question, if the answer tends to expose him to a criminal charge, but, if he states a particular fact, he is bound, on his cross-examination, to state all of the circumstances relating to that fact, although in doing so he may expose himself to a criminal charge. (*Ex parte Park*, 835.)

6. WITNESSES—INCRIMINATING.—OBJECTION that an answer to a question asked would tend to incriminate the witness must be made at the threshold of the examination. He cannot wait and answer a part and then refuse to answer other questions legitimate to a cross-examination. (*Ex parte Park*, 835.)

7. WITNESSES—DISMISSAL OF PROSECUTION—INCRIMINATION.—If the prosecution against an accused jointly indicted

with others has been dismissed in a particular case, while other cases of a similar character remain pending, and he is placed upon the stand as a witness in the case in which the prosecution as to him has been dismissed, he may decline to answer a question asked, on the ground that it incriminates him, when there is reasonable ground to apprehend that his answer would expose him to a criminal prosecution, or when the answers elicited on legitimate cross-examination can be used against him as a confession of guilt or participation in the cases still pending against him. (*Ex parte Park*, 835.)

8. EVIDENCE — CONFIDENTIAL COMMUNICATIONS. — A PHYSICIAN who discovers a fact or condition while attending his patient in relation to her person, will not be permitted to testify thereto without her consent, though such discovery was not required for his guidance or assistance in the discharge of his professional duties, if it was a necessary incident to the investigation made by him to enable him to discharge those duties. Hence, if a physician employed to attend a woman in childbirth, incidentally discovers umbilical hernia, he cannot testify thereto. (*Nelson v. Oneida*, 556.)

9. EVIDENCE OF EXPERTS.—IT IS COMPETENT, FOR THE PURPOSE OF SHOWING MALPRACTICE, for a surgical expert, with the result of a surgical operation, performed nearly two years prior before him, either on his own personal examination and investigation of such result, or through a hypothetical question stating the result properly before him, to give his opinion as to the cause or causes producing the result. (*Tullis v. Rankin*, 586.)

See Chattel Mortgages, 18; Evidence, 8; Habeas Corpus, 2; Wills, 8-12.



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